IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1184

E. I. MALONE, Commissioner of Labor and Industry for the State of Minnesota,

Appellant,

vs.

WHITE MOTOR CORPORATION and WHITE FARM EQUIPMENT COMPANY,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

WARREN SPANNAUS
Attorney General
State of Minnesota

RICHARD B. ALLYN
Solicitor General

KENT G. HARBISON
RICHARD A. LOCKRIDGE
JON K. MURPHY
Special Assistant
Attorneys General

515 Transportation Building
St. Paul, Minnesota 55155
Telephone: (612) 296-2961

1977—Northwest Brief Printing Co., 316 Chicago Avenue, Minneapolis 55415—338-5078

INDEX

APPENDICES

CITATIONS

Cases:

Statutes:

Other Sources:

IN THE

Supreme Court of the United States

October Term, 1976

No.

E. I. MALONE, Commissioner of Labor and Industry for the State of Minnesota,

Appellant,

vs.

WHITE MOTOR CORPORATION and WHITE FARM EQUIPMENT COMPANY,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the United States Eighth Circuit Court of Appeals entered on December 2, 1976, reversing the judgment of the District Court for the District of Minnesota and ruling that the National Labor Relations Act preempts the Minnesota Private Pension Benefits Protection Act.[1] The appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

[1]Minn. Stat. §§181B.01-17 (1974).

THE OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is reported at 545 F. 2d 599 (1976) and the opinion of the District Court for the District of Minnesota is reported at 412 F. Supp. 372 (1976). The text of these opinions is set forth in Appendices A and B, respectively, A. 1 and A. 26.

JURISDICTION

This action was initiated by the appellees in the United States District Court for the District of Minnesota pursuant to 28 U.S.C. §§1331, 1332 and 2201-2202 for a declaratory judgment that the Minnesota Private Pension Benefits Protection Act, Minn. Stat. §181B.01-17 (1974) (hereinafter Minnesota Pension Act) is preempted by the National Labor Relations Act, 29 U.S.C. §151 *et seq.* (hereinafter NLRA).

The appellees, relying solely on the preemption issue, also moved for a preliminary injunction and on March 18, 1976, the district court entered an order ruling that the Minnesota Pension Act was not preempted by the NLRA and denying appellee's motion for a preliminary injunction. On December 2, 1976, the United States Court of Appeals for the Eighth Circuit reversed the District Court and ruled that the Minnesota Pension Act was preempted by the NLRA. A notice of appeal to this Court was filed on December 7, 1976, with the Eighth Circuit Court of Appeals. The jurisdiction of this Court to review the decision of the Court of Appeals is conferred by 28 U.S.C. §1254(2).

STATUTE INVOLVED

The full text of the Minnesota Pension Act, Minn. Stat. §181B.01-17 (1974) is set forth in Appendix D, A. 49.

QUESTION PRESENTED

The Minnesota Pension Act protects Minnesota workers from the forfeiture of their promised pension benefits when a plant is closed or a private pension plan is terminated. The question presented is whether the court of appeals erred in reversing the district court and ruling that the Minnesota Pension Act was preempted by the NLRA.[2]

STATEMENT OF THE CASE

The Minneapolis-Moline Company, a farm implement manufacturer, operated plants in Minneapolis and Hopkins, Minnesota for many years. A pension plan for the hourly unionized workers had been in existence since 1950. Appellees purchased the Minneapolis-Moline Company in January, 1963, and became the successor employer to the pension plan. Appellees operated the two plants for nine and one-half years.

In January, 1972, appellees advised the employees that they were closing both plants. At that time there were over 1,000 hourly workers at the two plants. On June 3, 1972, appellees announced that the pension plan was severely underfunded and that there was a net deficiency

[2]The federal protection for retirees and pension plan participants afforded by the Employee Retirement Income Security Act, 29 U.S.C. §§1001 *et seq.* (ERISA) did not go into effect until after appellees' May 1, 1974, termination of their pension plan. Therefore, only the Minnesota Pension Act provides protection to these participants in appellees' pension plan who lost substantial retirement benefits because of the plan's termination.

in the fund of some fourteen and one-half million dollars when the fund was measured against the present value of the pension benefits promised.[3]

Appellees further announced that when the pension plan was terminated, pension benefit payments would immediately be reduced to the level of benefits set forth by appellees in a March, 1972 "Guarantee Letter" and that supplemental pension benefits owing to employees who had opted for early retirement would no longer be paid. This "Guarantee Letter" effectively reduced the level of benefits promised in the pension plan by approximately 60 percent. The reduced benefits would be paid from the pension fund until it was exhausted and thereafter directly from appellees' company funds. The pension plan had previously provided for a 35-year amortization period for any unfunded past service liability.

On June 30, 1972, the Lake Street plant in Minneapolis, the larger of the two plants, was closed although the Hopkins plant, with over 200 workers, was kept open. Also on June 30, 1972, appellees attempted to terminate the pension plan for their hourly employees at both plants and ceased paying regular monthly pension benefits, as well as supplemental benefits where applicable, and paid benefits only to the extent required under their "Guarantee Letter." This initial attempt to terminate the pension plan failed because it was held in an arbitration between the union representing the hourly employees and appellees that the plan could not be terminated until May 1, 1974, when the governing collective bargaining agreement was to ex-

[3]Hearings on Private Welfare and Pension Plans, Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess. 736 (June 3, 1972) (hereinafter the "Mondale Hearing"). A copy of this Hearing was lodged with the district court.

pire.[4] This award to the union was upheld in subsequent litigation initiated by appellees challenging the award. *U.A.W. v. White Motor Corp.*, 505 F. 2d 1193 (8th Cir. 1974), *cert. denied*, 421 U.S. 921 (1975).

Pursuant to the arbitration award, the appellees were not only prohibited from terminating the pension plan until May 1, 1974, but were also required to pay full benefits out of the regular pension fund until it was exhausted. Thus, after having their benefits substantially reduced for a little more than a year while litigation ensued, the nearly 1,000 retirees again received benefits under the pension plan rather than the reduced amount set forth in the "Guarantee Letter" until the regular pension fund became insufficient to pay those benefits in March, 1976. On April 1, 1976, the retirees' benefits were again reduced to the level of benefits provided by the "Guarantee Letter," and those retirees are now living on approximately 40 percent of the benefits promised under the 1971 pension plan.[5]

At the time of the closing of the Lake Street plant in 1972, the majority of the employees were between the ages of 45 and 64. Some current retirees had worked at appellees' plants for as long as 40 years and many employees retired after as long as 25 to 40 years of employment. Often other job opportunities were refused because employees did not want to lose the pension benefits they were supposed to be accruing during those years of employment.[6] Thus, over the years appellees and their predecessor had developed a loyal and productive work force. At

[4]White Motor Corp. and U.A.W., 61 Lab. Arb. 320, 328, 331 (1973) (Seitz, Arbitrator).
[5]*See* Mondale Hearing at 783.
[6]*See* Retirees Affidavits, Eighth Circuit Appendix at 46-83.

least part of this loyalty and productivity was due to the appellees promise of reasonable retirement benefits.[7]

The Minnesota Pension Act became effective on April 10, 1974, shortly before appellees terminated the pension plan. It is directed at two historically typical methods by which employers avoid the payment of retirement benefits allegedly assured by private pension plans: (a) the mass termination of employees who have participated for a reasonable number of years in their employer's pension plan before their pension benefits have vested under the plan and (b) the termination of pension plans inadequately funded to provide the retirement benefits the retired employees expected from the plan. The Minnesota Pension Act, which is administered by appellant, protects Minnesota employees with ten or more years of covered service under a pension plan from the forfeiture of pension benefits resulting from either method of avoiding the payment of pension benefits.

That protection is afforded by requiring a Minnesota employer who ceases to operate a place of employment in Minnesota or terminates a pension plan to pay a pension funding charge if either such action results in the forfeiture of pension benefits. Minn. Stat. §§181B.03-04 (1974). The pension funding charge is used to purchase annunities that will provide the protected employees with the promised monthly pension payments on reaching retirement age. Minn. Stat. §181B.12 (1974). The benefit provided by the annuity must be equal to that portion of the employee's normal retirement benefit, as defined in the pension plan, that accrued during his years of covered service under the plan.

[7] *Id.*

Following receipt of notice from appellees in April, 1974, of their intent to terminate the pension plan effective May 1, 1974, appellant, pursuant to his statutory duties, commenced an investigation to determine the extent of the forfeiture of pension benefits that would result and the corresponding obligation, if any, of appellees to pay a pension funding charge under the Minnesota Pension Act. On May 15, 1975, appellees filed the instant action in the District Court for the District of Minnesota seeking a declaration that the Minnesota Pension Act was unconstitutional. Thereafter, on August 18, 1975, appellant notified appellees of the assessment of a pension funding charge and therein afforded appellees an opportunity to request a hearing concerning, *inter alia,* the amount and method of satisfaction of that charge. Appellees did request a hearing and subsequently moved for summary judgment in federal district court on the preemption issue and for an injunction against the state administrative proceedings. The District Court, (Alsop, J.), denied appellees summary judgment and declined to issue an injunction. The court ruled that the Minnesota Pension Act did not conflict with the NLRA and federal labor policy and further held that Congress had indicated its intent to leave the regulation of pension matters to the individual states. The Court of Appeals, in reversing the district court, held that this Court's decisions in *Lodge 76, Machinists v. Wisconsin Employment Relations Comm.,* — U.S. —, 96 S.Ct. 2548 (1976) and *Local 24, Teamsters v. Oliver,* 358 U.S. 283 (1959) required a finding by the court of preemption of the Minnesota Pension Act by the NLRA.

THE QUESTIONS ARE SUBSTANTIAL

In reversing the District Court and invalidating the Minnesota Pension Act, the Court of Appeals construed this Court's labor preemption decisions in such a broad and expansive fashion so as to virtually preclude any state legislation in areas which only tangentially relate to specific provisions in collective bargaining agreements. The Court of Appeals' decision represents an unwarranted intrusion by the federal judiciary into areas previously believed to be within the scope of state authority and exhibits a basic lack of concern for the principles of federalism and federal-state comity.

1. This Court's Established Judicial Tests For Labor Preemption Do Not Warrant Invalidation Of The Minnesota Pension Act.

The Minnesota Pension Act simply does not create the type of conflict with national labor policy that this Court has determined warrants preemption. Examination of those judicially-established tests for NLRA preemption, in the context of the conduct regulated by the Minnesota Pension Act, leads to the unavoidable conclusion that the Minnesota law should not fail before the national labor policy.

a. The Minnesota Pension Act Is Not Preempted Because It Does Not Regulate The Conduct Of Parties Engaged In The Collective Bargaining Process Nor Affect The Bargaining Process.

A primary objective of Congress in enacting the NLRA was to establish a mechanism and framework within which labor-management relations could proceed peacefully and with a minimum of economic disruption. *See* 29 U.S.C. §151. The mechanism relied upon was the collective bargaining process as regulated and protected by the NLRA. Much of Congressional labor policy and, correspondingly, the provisions of the NLRA are, therefore, directed primarily to the relations and conduct of labor and management while engaged in that process. Just as the major thrust of the NLRA was directed at the conduct of parties engaged in the collective bargaining process itself, it follows naturally that the primary thrust of preemption by the NLRA of state laws involves state regulation directed at the conduct of parties engaged in collective bargaining.

In furtherance of the Congressional goal of establishing and protecting effective and equitable collective bargaining, Congress identified in sections 7 and 8 of the NLRA, certain conduct of employees and employers that is protected from interference and other conduct that is prohibited as unfair labor practices. In order to preserve the integrity of this fundamental aspect of national labor policy, this Court formulated the *Garmon* rule of preemption, explaining that:

> To leave the States free to regulate conduct *so plainly within the central aim of federal regulation* involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.

San Diego Building Trades Council v. Garmon, 395 U.S. 236, 244 (1959) (emphasis added). This standard was reiterated in *Amalgamated Ass'n. of Street Employees v. Lockridge*, 403 U.S. 274 (1971).

Although the Court of Appeals asserted that the Min-

nesota Pension Act alters the collective bargaining process, the activity that the Pension Act in fact regulates is not the negotiation of the terms of a pension plan but rather an employer's cessation of the operation of a place of employment or a pension plan, resulting in the forfeiture of accrued pension credits. Even a cursory reading of Section 7 and 8 of the NLRA, 29 U.S.C. §§157-58, reveals that such actions are neither protected activities nor prohibited unfair labor practices. Indeed, such activities cannot reasonably be said to comprise any part of the collective bargaining process that is the subject of the NLRA, and are therefore *not*, in the language of *Garmon*, "within the central aim of federal regulation."

This is particularly true when it is recognized that the Minnesota Pension Act comes into play only when there is a termination of a substantial number of employees or the termination of a pension plan, and even then there is a further requirement that such a termination result in a forfeiture of accrued pension credits before the Minnesota Pension Act can apply.

b. The Minnesota Pension Act Is Not Preempted By The Doctrine Of Local 24, Teamsters v. Oliver

The Eighth Circuit relied heavily on *Local 24, Teamsters v. Oliver*, 358 U.S. 283 (1959) in reversing the district court and holding that "[t]he Minnesota Pension Act directly intrudes upon the employer's substantive obligations under the pension plan . . . ." 545 F. 2d at 604. In *Oliver*, the state courts had held that an Ohio antitrust statute rendered invalid part of a collective bargaining agreement that established minimum rentals to be paid for

trucks leased to a trucking company when the owner drove the truck as an employee of the company. Thus, the effect of the state antitrust law was to absolutely prohibit bargaining on a mandatory subject of collective bargaining. This Court reversed the state court, holding that the Ohio antitrust statute could not be applied to prohibit the effectuation of the parties' agreement concerning a subject of mandatory bargaining under the NLRA.[8]

Although the court of appeals did not seek to analyze *Oliver*, it made clear its belief that the situation in *Oliver* was directly on point with the instant case. The court thus overlooked three fundamental, yet obvious, distinctions between the Ohio antitrust statute preempted in *Oliver* and the Minnesota Pension Act, distinctions which indicate that the nature and degree of conflict that existed between the state regulation and federal labor policy in *Oliver* are plainly not presented by the Minnesota Pension Act.

First, and most significantly, the effect of the Ohio antitrust statute in *Oliver* was to impose an *absolute prohibition* on inclusion of certain substantive terms that the parties had agreed upon in the collective bargaining agreement. Indeed, any agreement between the parties establishing minimum rentals for the driver-owned trucks would have been precluded by the Ohio law. Although the NLRA is ordinarily not concerned with the substance of collectively-bargained agreements,[9] the effect of the Ohio statute was to *absolutely preclude* negotiation and agreement

[8]This Court had first determined that the rental provisions of the agreement were so related to the wage provisions that they were a mandatory subject of collective bargaining.

[9]H. K. Porter Co. v. N.L.R.B., 397 U.S. 99 (1970).

on a mandatory subject of collective bargaining.[10] Additionally, because the state antitrust law effectively prevented inclusion of the terms in the agreement, not only the bargaining process but also the ongoing employer-employee relationship during the life of the agreement was affected. It was such a direct conflict that prompted this Court to find in *Oliver* that preemption was required.

In contrast, the Minnesota Pension Act does not purport to dictate the substantive terms of pension plans or to restrict the scope of the terms of agreement that the parties may reach in collective bargaining concerning pension plans. Nor does the Minnesota Pension Act intrude into the ongoing employer-employee relationship by preventing the effectuation of the terms of an ongoing collectively-bargained pension plan. In fact, the Minnesota Pension Act cannot even apply to a situation in which both the employment relationship and the pension plan remain in effect. Rather, the Minnesota Pension Act comes into play only when there is a termination of a pension plan or when the employees covered by such a plan are discharged. Indeed, there is a further requirement that such termination results in a forfeiture of accrued pension credits before the Minnesota Pension Act can apply. Thus, the Minnesota Pension Act affects only the *dissolution* of pension rights resulting from the termination of a pension plan or the employment relationship of covered employees. That is not the type of substantive regulation of a collectively-

[10]The fact that the Ohio law vitiated a contract term dealing with a mandatory subject of collective bargaining was critical in Oliver. Local 24, Teamsters v. Oliver, *supra,* 358 U.S. at 295. While pension benefits for active employees are a mandatory subject, bargaining concerning retiree benefits has been held not to be mandatory. Allied Chemical & Alkali Workers of America, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971).

bargained agreement that was preempted in *Oliver;* the parties here are not prevented from "carrying out their agreement" on a mandatory subject of collective bargaining in the sense that the parties in *Oliver* were. *Cf. Thacher v. United Construction Workers,* 10 N.Y. 2d 439, 180 N.E. 2d 245, 224 N.Y.S. 2d 657 (1962).

Although the pension plan included a 35-year amortization period for the net deficiency in the plan, this provision certainly did not constitute an agreement that promised pension benefits could be sharply slashed if the appellees' chose to terminate the pension plan. In addition, that plan has long since been terminated. Furthermore, appellant is aware of no NLRB or court decisions determining that provisions of a pension plan limiting the employer's obligation to pay promised pensions on termination of the plan are within the scope of mandatory bargaining subjects.

The second major distinction between *Oliver* and the instant case is that *Oliver* involved a state antitrust statute and, as this Court has said:

> [p]ermitting state antitrust law to operate in [the labor] field could frustrate the basic federal policies favoring employee organization and allowing elimination of competition among wage earners, and interfere with the detailed system Congress has created for regulating organizational techniques.

Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616, 636 (1975). The Court of Appeals chose to read *Oliver* broadly and emphasized some of its more general dicta relating to preemption. Such an expansive reading of *Oliver,* however, overlooks the fact that *Oliver* was but a part of a long history of efforts by both Congress and

the courts to deal with the conflict that exists between federal labor policy and antitrust policy, both at the state and federal level. *See, e.g. Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955); Clayton Antitrust Act §20, 29 U.S.C. §52.

Indeed, the district court quite correctly distinguished *Oliver* from the instant case on the grounds that the state law challenged there was an antitrust statute, recognizing that

> [s]tate antitrust statutes present unique problems in the area of labor preemption . . . .
>
> The inherent conflict and delicate balance which exists between labor and antitrust policy does not exist between labor policy and the regulation of pensions.
>
> 412 F. Supp. at 381.

Third, in *Oliver* the employer-employee relationship was continuing while in the instant case the employment relationship had been severed for more than three years before the defendant assessed a pension funding charge. Thus, the Minnesota Act does not impair or alter the ongoing collective bargaining process between employers and employees since once the employment relationship is severed the workers are no longer "employees" within the meaning of federal labor law. *See Allied Chem. & Alkali Wkrs. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166-171 (1971).

The Court of Appeals, in applying *Oliver* to the instant case, also relied extensively on this Court's recent decision of *Lodge 76, Machinists v. Wisconsin Employment Relations Comm.*, — U.S. —, 96 S.Ct. 2548 (1976) where

this Court reversed the Wisconsin Supreme Court's affirmance of an action by the Wisconsin Employment Relations Commission enjoining a concerted refusal to work overtime by union employees during the course of contract negotiations. This action on the part of the Commission was quite clearly a direct and material intrusion into the essence of the collective bargaining process. Wisconsin's restriction of the flexing of bargaining strength by one of the parties to collective bargaining understandably would have had a direct and significant influence on the substantive terms the parties could otherwise reach if left to the "free play of contending economic forces" each party could muster. *Id.* at 2558.

Unlike the state conduct in *Wisconsin Employment Relations Comm.*, the Minnesota Pension Act is "not directed toward altering bargaining positions of employers or unions" and at most has but an "incidental effect on relative bargaining strength." *Id.* at 2560. (Powell, J., and Burger, J., concurring). The Minnesota Act is, at most, peripheral to the bargaining process.

In examining the *Wisconsin Employment Relations Comm.* case, the Court of Appeals properly noted that states "may not directly control the substantive terms of the contract which results from that bargaining", 545 F. 2d at 606, but, beyond this superficial statement, the Court of Appeals never analyzed the *Wisconsin Employment Relations Comm.* case nor purported to establish how it believed the Minnesota law "directly" interfered with the collective bargaining process or the substantive terms of the contract arrived at through that bargaining process. This lack of analysis by the Court of Appeals is critical since even a cursory examination of the Minnesota Act shows

that it is irrelevant to the collective bargaining process and in no way affects that process or alters the economic power of one party. As noted above, the Act comes into play *only* where the employment relationship of a large number of workers is severed or where a pension plan is terminated; and even then, such a termination must result in a forfeiture of accrued pension credits before the Minnesota Pension Act can apply.

In summary, the Court of Appeals quoted extensively from *Wisconsin Employment Relations Commission* and *Oliver* but neglected to analyze those two cases and their relationship with the Minnesota Pension Act. This failure to examine the precise method of operation of the Pension Act led the Court of Appeals to improperly rely on two cases of this Court, both of which involved state conduct affecting the very heart of the collective bargaining process. In contrast, the Minnesota Act operates, at most, in a very peripheral manner on labor relations.

2. Congress Has Evidenced Its Determination That State Regulation Of Pension Plans Is Compatible With Federal Labor Laws.

The NLRA contains no provisions preempting state laws. Accordingly, this Court has pointed out that:

> A . . . factor that has played an important role in [the] shaping of the preemption doctrine has been the necessity to act without specific congressional direction. The precise extent to which state law must be displaced to achieve . . . [the] ends sought by the national legislature has never been determined by the Congress . . . .

Amalgamated Ass'n. of Street Employees v. Lockridge, 403 U.S. 274, 289 (1971).

Consequently, in the absence of express indications by Congress of the extent to which it intended the NLRA to supersede state laws, the courts have fashioned preemption standards based on their interpretation of Congressional intent. In the field of pension plan regulation, there are relevant expressions of Congressional intent. The Court of Appeals read this intent in a contorted and narrow manner and attempted to minimize if not completely ignore its significance. However, to the extent that "the labor relations preemption doctrine finds its basic justification in the . . . intent of Congress[,]" *Lockridge, supra* at 302, those expressions cannot so readily be dismissed and ignored.

a. The Enactment Of ERISA And The Acknowledgement In ERISA Of The Existence And Efficacy Of Similar State Legislation Evidences The Lack Of Conflict Between Pension Protection And The NLRB.

The enactment of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001, *et seq.*, on September 2, 1974, was a recognition that existing state and federal legislation had not been adequate to provide the necessary protection of promised pension benefits. *See generally* 29 U.S.C. §1001(a).

ERISA, which provided, *inter alia*, minimum participation, vesting, and funding provisions[11] imposes direct restrictions on the substantive terms of pension plans and inter-

[11] 29 U.S.C. §§1051-1102.

feres with the terms of pension plans far more directly than the Minnesota Pension Act does. Additionally, the termination insurance provisions of ERISA[12] impose a liability on employers for the payment of forfeited pension benefits.

Significantly, ERISA provides no exemption from its coverage for collectively-bargained pension plans. Moreover, Congress imposed its substantive requirements on pension plans, including those collectively-bargained-for, without purporting to modify or alter its NLRA labor policy concerning collective bargaining. In fact, Congress, in ERISA, explicitly disclaimed any such modification or alteration of other federal laws:

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in section 1031 and 1137(b) of this title) . . . .

29 U.S.C. §1144(d). The most direct and logical conclusion to be derived from the fact that Congress imposed its regulation of pension plans on collectively-bargained plans is that such regulation poses no conflict with the collective bargaining process. Since Congress did not believe that ERISA interfered with the NLRA, it follows that the Minnesota Act does not in any way interfere with the NLRA.

In addition, the treatment accorded state laws relating to pension plans by ERISA is a further indication that Congress perceived no conflict between its labor policy and state regulation of pension plans to protect pension benefits. Although such state laws are preempted by ERISA, presumably to avoid duplicate or inconsistent regulation

[12]29 U.S.C. §§1301-1381.

of pension plans, preemption was specifically not made effective until January 1, 1975. 29 U.S.C. §1144(a). Moreover, state pension laws were not preempted at all with respect to causes of action that arose and acts or omissions that occurred prior to January 1, 1975. *Id.*

If Congress had perceived a conflict between such state laws and its policy concerning collective bargaining under the NLRA, it is doubtful that it would have allowed such state statutes to remain in effect even from September 2, 1974, the date of enactment of ERISA, to January 1, 1975, the effective date of the preemption provision. Nor is it logical that Congress would have provided the exception to preemption for enforcement and resultant continued efficacy of state laws if it had deemed them to be in conflict with national labor policy.

b. The Pension Disclosure Act Expressly Reserved To The States Authority To Regulate The Administration And Dissolution Of Pension Plans.

The Welfare and Pension Plans Disclosure Act (hereinafter the "Pension Disclosure Act"), 29 U.S.C. §301 *et seq.*, a precursor to ERISA, was enacted in 1958 following extensive Congressional study of the need for legislation to protect employee pension and welfare benefits.[13] *See* S. Rep. No. 1440, 85th Cong., 2d Sess. (1958), 1958 *U.S. Code Cong. and Adm. News*, 4137-4140, 4150-51.

However, in attempting to alleviate the problems involving pension plans through the Pension Disclosure Act, Congress chose to limit the role of the federal government merely to requiring reporting on the disclosure of infor-

[13]The Pension Disclosure Act was repealed by ERISA and replaced by reporting and disclosure provisions in that Act.

mation concerning the terms and administration of such plans. That limitation did not, however, reflect a decision to leave pension plans unregulated for the Act specifically provided that state laws relating to pension plans were to remain viable.

> The provisions of this chapter . . . shall not be held to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law . . . of any State affecting the operation or administration of employee . . . pension benefit plans. . . .

29 U.S.C. §309(b). Indeed, it has been held with respect to state regulation of the dissolution of a collectively-bargained employee welfare fund that section 309(b) "in so many words permits a State such regulation. . . ." *Thacher v. United Construction Workers,* 10 N.Y. 2d 439, 444, 180 N.E. 2d 245, 247, 224 N.Y.S. 2d 657, 660 (1962).

Furthermore, it is evident that in considering the scope of the Pension Disclosure Act and the continuing viability of state laws relating to pensions Congress was not unmindful of the Act's relationship to the labor policy expressed in previous enactments. The legislative history of the Pension Disclosure Act reveals that Congress was aware that it was dealing with both collectively-bargained pension plans and those not so bargained for, and of relevant distinctions between those two types of plans. *See, e.g.,* S. Rep. No. 1440, 85th Cong., 2d Sess. (1958), 1958 *U.S. Code Cong. and Adm. News* 4137, 4143-4144; H.R. Rep. No.

2283, 85th Cong., 2d Sess. (1958), 1958 *U.S. Code Cong. and Admin. News* 4181, 4188-4189.[14]

Thus, fully cognizant of its established labor policy, and in the face of explicit concern for the effect of disclosure and reporting requirements on the collective bargained process, Congress enacted the Pension Disclosure Act, limiting the federal role to reporting and disclosure but clearly reserving a critical regulatory function to the states. The logical import of that action is that Congress did not consider state regulation of the administration, operation, and dissolution of pension plans directed at the problems that required the enactment of the Pension Disclosure Act to be in conflict with established federal labor policy.

CONCLUSION

The established judicial tests for preemption do not warrant invalidation of the Minnesota Pension Act. Furthermore, Congress through ERISA and the Pension Disclosure Act has indicated its intent that pension regulation was to be left to the states until ERISA became effective. The court of appeals chose to read this Court's labor preemption decisions very broadly and the legislative history of the relevant pension laws narrowly in order to invalidate the Minnesota Act and extinguish much of the pensions of nearly 1,000 former White Motor workers. This approach suggests a striking lack of sensitivity for our federal system and the presumption of validity which attaches to all legislation, including state legislation. A more balanced

[14]In addition, the minority and supplemental views that Senator Gordon Allott expressed in that Senate Report raised particular concern for the effect of the Pension Disclosure Act on the collective bargaining process. S. Rep. No. 1440, 85th Cong., 2d Sess. (1958), 1958 *U.S. Code Cong. and Adm. News* 4137, 4168 and 4175.

view of the role which state legislatures and state governments play in this nation's federal system and a more compassionate view of the hundreds of White Motor retirees who relied for many of their working years on the promise of a decent pension would undoubtedly have led to an affirmance of the district court decision.

For the benefit of nearly 1,000 retirees who have lost the major part of their pensions and to clarify what role the states still have in areas tangentially related to labor relations, this Court should note probable jurisdiction.

Respectfully submitted,

WARREN SPANNAUS
Attorney General
State of Minnesota
RICHARD B. ALLYN
Solicitor General
KENT G. HARBISON
RICHARD A. LOCKRIDGE
JON K. MURPHY
Special Assistant
Attorneys General
515 Transportation Building
St. Paul, Minnesota 55155
Telephone: (612) 296-2961

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 76-1266

White Motor Corporation and White Farm Equipment Company,

Appellants,

vs.

E. I. Malone, Commissioner of Labor and Industry for the State of Minnesota,

Appellee.

Appeal from the United States District Court for the District of Minnesota.

Submitted: September 15, 1976
Filed: December 2, 1976

Before BRIGHT and WEBSTER, Circuit Judges, and TALBOT SMITH, Senior District Judge.*

*TALBOT SMITH, Senior District Judge, Eastern District of Michigan, sitting by designation.

BRIGHT, Circuit Judge.

The question presented by this case is whether federal labor policy preempts the legislative power of the State of Minnesota to impose upon the White Motor Corporation[1] (White Motor) the obligation to fully fund its employee pension plan upon the closing of its factory and terminating its employees, notwithstanding an agreement to the contrary contained in the collective bargaining contract between White Motor and the employees' unions. The district court answered this preemption question in the negative[2] and denied White Motor injunctive relief barring enforcement of the questioned Minnesota legislation, referred to here as the Minnesota Pension Act.[3] We disagree, and hold that the Minnesota Pension Act, as applied to White Motor, is preempted by federal labor policy.

We have earlier considered other problems relating to White Motor's pension plan.[4] The historical facts related there are a prelude to the present litigation. White Motor closed its Minneapolis factory and attempted to terminate as of June 30, 1972, the pension plan benefiting employees

[1]The district court described the organizational history of appellant White Motor, as follows:

> In 1962, White Motor organized a subsidiary, Minneapolis-Moline, Inc. Minneapolis-Moline, Inc. on January 1, 1963 acquired the assets of Motec Industries, Inc. (formerly called the Minneapolis-Moline Company) which had operated farm manufacturing plants at Hopkins, Minnesota and Minneapolis, Minnesota, on Lake Street. In 1969 Minneapolis-Moline, Inc. changed its name to White Farm. White Farm still operates the Hopkins plant but closed the Lake Street plant in June, 1972. [*White Motor Corp. v. Malone*, 412 F. Supp. 372, 373 (D. Minn. 1976).]

[2]The district court opinion is supported as *White Motor Corp. v. Malone*, 412 F. Supp. 372 (D. Minn. 1976).

[3]The state statute involved in this litigation is the Private Pension Benefits Protection Act, ch. 437, §§1-18 (1974), Minn. Laws 2d Reg. Sess. 825-31.

[4]*International Union, UAW v. White Motor Corp.*, 505 F.2d 1193 (8th Cir. 1974), *cert. denied*, 421 U.S. 921 (1975).

at the Minneapolis plant and employees at another White Motor factory in Hopkins, Minnesota. The UAW (Union) challenged the action contending that the pension plan could not be terminated prior to May 1, 1974, the expiration date of the collective bargaining agreement then in effect. An arbitrator ruled in favor of the Union, and the federal district court sustained the award as within the arbitrator's powers granted under terms of the collective bargaining agreement. On appeal, we affirmed. During that prior litigation, White Motor took appropriate action to terminate the pension plan as of May 1, 1974, if the arbitrator's determination should be sustained.[5]

During the pendency of the preceding litigation, the Minnesota legislature enacted the Minnesota Pension Act, effective April 10, 1974.[6] The statute requires full funding

[5]We observe that at a later date (June 5, 1975), White Motor, and the Union entered into a new pension plan for the still-operating Hopkins plant.

[6]Relevant statutory provisions read:

> 181B.03 PENSION REFUNDING CHARGE, VESTED BENEFITS PRIOR TO PENSION BENEFITS PROTECTION ACT. Every employer who hereafter ceases to operate a place of employment or a pension plan within this state shall owe to his employees covered by sections 181B.01 to 181B.17 a pension funding charge which shall be equal to the present value of the total amount of vested pension benefits based upon covered service occurring before April 10, 1974 of such employees of the employer who have completed ten or more years of any covered service under the pension plan of the employer and whose vested pension benefits have been or will be forfeited because of the employer's ceasing to operate a place of employment or a pension plan, less the amount of such vested pension benefits which are compromised or settled to the satisfaction of the commissioner as provided in sections 181B.01 to 181B.17.
>
> 181B.04 NONVESTED BENEFITS PRIOR TO ACT. Every employer who hereafter ceases to operate a place of employment or a pension plan within this state shall owe to his employees covered by sections 181B.01 to 181B.17 a pension funding charge which shall be equal to the present value of the total amount of nonvested pension benefits based upon service occurring before

of pension benefits whenever an employer ceases to operate a place of employment or pension plan. The district court described and interpreted the relevant statutory provisions as follows:

> The title of the Act describes it as
>
> > "[a]n act relating to private pensions; imposing an obligation upon certain employers who terminate pension plans; providing for the enforcement and method of payment of such obligations." Minn. Laws 1974, ch. 437.
>
> Minn. Stat. §§181B.03-.06 impose a "pension funding charge" directly against any employer who ceases to operate a place of employment or a pension plan. Such charge shall be equal in amount to the vested and nonvested benefits described in the statutory provisions. These sections essentially provide that any employee who has completed ten or more years of credited service under a pension plan has, upon termination of that plan or of his place of employment, an automatically vested right to all pension benefits he would have received had the particular plan not been terminated or had the place of business not been closed.
>
> Minn. Stat. §§181B.09-.12 provide that the Commissioner of Labor and Industry, after investigation, shall certify amounts owing by an employer. That certified amount is declared, under §181B.11, to "be a lien upon the employer's assets." The pension funding charge is used to purchase an annuity payable to the employee when he reaches normal retirement age. [*White Motor Corp. v. Malone*, 412 F. Supp. 372, 375 (D. Minn. 1976).]

April 10, 1974 of such employees of the employer who have completed ten or more years of any covered service under the pension plan of the employer and whose nonvested pension benefits have been or will be forfeited because of the employer's ceasing to operate a place of employment or a pension plan, less the amount of such nonvested pension benefits which are compromised or settled to the satisfaction of the commissioner as provided in sections 181B.01 to 181B.17. [Private Pension Benefits Protection Act. ch. 437, §§3, 4 (1974), Minn. Laws 2d Reg. Sess. 828 (codified as Minn. Stat. §§181B.03, .04).]

Pursuant to applicable provisions of the Minnesota Pension Act, the State of Minnesota notified White Motor that the corporation owed a pension funding charge of $19,-150,053. White Motor's obligations as to vesting and, particularly, as to funding under the pension plan differed significantly from obligations imposed on employers by the Minnesota Pension Act. The district court described the history of White Motor's plan and discussed the differences in obligations imposed on the employer by its plan, as compared to the statutory obligations under Minnesota law, as follows:

> In 1950, a pension plan was established for the employees of the predecessor of White Farm [White Motor]. This pension plan was carried forward in some form in each of the subsequent years that collective bargaining agreements were entered into: 1954, 1959, 1962, 1965, 1968 and 1971. Since 1955, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and certain of its local unions (hereinafter collectively referred to as the "UAW") have been the bargaining representatives for production and maintenance em-

ployees and clerical employees at the Lake Street and Hopkins plants. Pension benefits resulting from collective bargaining agreements continued to increase after the purchase of Motec Industries by White Motor in 1963.

The 1971 version of the pension plan is the plan pertinent to this action. The 1971 plan contained a provision, first inserted in the 1968 plan, requiring the funding of unpaid past service liability. Unpaid past service liability is at any given time, the excess of the accrued liability of the pension fund over the present value of the assets of the fund. The 1971 plan provided:

> *Section 9.05*
>
> The unfunded net deficiency as of January 1, 1971 shall be amortized over a thirty-five (35) year period from January 1, 1971. The deficiencies resulting from benefit increases effective January 1, 1972 and January 1, 1973 shall be funded uniformly over a thirty-five (35) year period from January 1, 1972 and January 1, 1973 respectively.
>
> * * *

In language unchanged since the 1950 pension plan, the 1971 plan provided for the payment of pensions as follows:

> *Section 6.09—Source of Pensions*
>
> Pensions shall be payable only from the Fund and rights to pensions shall be enforceable only against the Fund.
>
> * * *

> *Section 6.17—No Other Benefits*
>
> No benefits other than those specifically provided for are to be provided under this Plan. No employee shall have any vested right under the Plan prior to his retirement and then only to the extent specifically provided herein.
>
> * * *
>
> *Section 9.04—Rights of Employees in the Fund*
>
> No employees, participant or pensioner shall have any right to, or interest in, any part of any Trust Fund created hereunder, upon termination of employment or otherwise, except as provided under this Plan and only to the extent therein provided. All payments of benefits as provided for in this Plan shall be made only out of the Fund or Funds of the Plan and neither the Company nor any Trustee nor any Pension Committee or Member thereof shall be liable therefor in any manner or to any extent.

During the 1968 and 1971 negotiations with UAW, Pension Guarantees applicable to the Lake Street and Hopkins plants were given by White Motor. These Guarantees provided that, upon termination of the pension plan, benefits were guaranteed by White Motor at a designated benefit level. By giving the Guarantees, White Motor assumed a direct liability of approximately $7,000,000.

* * *

At the time the Lake Street plant was closed the pension fund was only partially funded and there was

> a net deficiency in the fund of approximately $14-000,000. [*White Motor v. Malone, supra,* 412 F. Supp. at 373-75 (footnote omitted).]

The Minnesota Pension Act obligations conflict with White Motor's pension plan provisions in the following respects: (1) the Act grants employees vested rights to pension benefits which are not available under the pension plan; (2) to the extent of any deficiency in the pension fund, the Act requires satisfaction of pension benefits from the general assets of the employer, while the pension plan provides that benefits shall be paid only out of the pension fund; and (3) the Act does not permit employers to escape liability for funding of pension rights, but the pension plan permits White Motor to terminate the plan at any time, and in so doing end any liability for future payments to the pension fund, save those specifically guaranteed. Thus, essential features of the pension plan, deferred funding of past service liability[7] coupled with limited employer liability and the power to terminate, were negated by the Pension Act.

The district court rejected White Motor's summary judgment motion for a declaration of invalidity of the Pension Act on preemption grounds, and for relief by way of a temporary injunction against its enforcement, reasoning that,

[7]The district court noted that deferred funding of past service liability is a common feature of pension plans. In essence, past service liability is met during continuing business operations by the employer's continuing contributions to the pension fund. If the plan is terminated, the pension fund becomes fixed and pension obligations remain partially unfunded. The district court also noted that in the 1971 collective bargaining agreement the parties had agreed to amortize the unfunded deficiency over the next 35 years. *White Motor Corp. v. Malone, supra,* 412 F. Supp. at 374.

> [t]he employer's duty to bargain in good faith over pensions is not altered by the Pension Act. The Pension Act does not require labor and management to agree to a pension plan or that specific provisions be included in a pension plan.
>
> The NLRA does not regulate the substantive terms of a collective bargaining agreement. * * *
>
> The danger addressed in *Garmon* [359 U.S. 236 (1959)] is not presented by the facts of the present action. The state is not attempting to regulate a subject matter which lies within the exclusive competence of the National Labor Relations Board. The Pension Act does not
>
>> ". . . regulate conduct so plainly within the central aim of federal regulation involv[ing] too great a danger of conflict between power asserted by Congress and requirements imposed by state law. . . ."
>
> [*White Motor Corp. v. Malone, supra,* 412 F. Supp. at 379 (citations omitted).]

Additionally, the district court determined the preemption doctrine was inapplicable to pension plans, on the ground that Congress in the Welfare and Pension Plans Disclosure Act, Pub. L. No. 85-836, 72 Stat. 997 (1958) (codified at 29 U.S.C. §301 *et seq.*), as amended, explicitly recognized state power over pension plan "operation" or "administration." In that regard the district court wrote:

> Congress expressly provided that states should remain free to become involved in the regulation of pension plans when it stated:

> The provisions of this chapter . . . shall not be held to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law . . . of any State affecting the operation or administration of employee . . . pension benefit plans. . . .

29 U.S.C. §309(b).

The legislative history of the Pension Disclosure Act further emphasizes the regulatory power retained by the states. The Senate Report stated:

> . . . [The Pension Disclosure Act] is a disclosure statute and by design endeavors *to leave regulatory responsibility to the States.*
>
> * * * * *
>
> . . . It is designed to place the primary responsibility for the policing and improved operations of these plans upon the participants themselves, with a minimum of interference in the natural development and operation of such plans, *to leave to the States the detailed regulations relating to insurance, trusts, and other phases of their operations,* and to place the least possible burden by way of costs and otherwise upon the plans and upon the Federal Government. [emphasis added]

S. Rep. No. 1440, 85th Cong., 2d Sess. (1958), 1958 *U.S. Code Cong. and Adm. News* 4137, 4153-4154.

> Moreover, Congress was specifically aware that pension plans were often the product of the collective bargaining process. *See, e.g.,* S. Rep. No. 1440, 85th Cong., 2d Sess. (1958), 1958 *U.S. Code Cong. and Adm. News* 4181, 4188-4189. Thus Congress was not unmindful that it was permitting States to regulate a subject matter which was the product of collective bargaining. [*White Motor Corp. v. Malone, supra,* 412 F. Supp. at 380-81.]

We disagree.

The Minnesota Pension Act directly intrudes upon the employer's substantive obligations under the pension plan, obligations arrived at freely through collective bargaining, and appears in its operation to be a unique legislative act. The Supreme Court's holdings and decisions in the area of federal labor law preemption require reversal.

Section 7 of the National Labor Relations Act (29 U.S.C. §157) establishes the right of employees to form and join labor organizations and to bargain collectively through representatives of their own choosing. Sections 8(a) (5), 8(b) (3), and 8(d) of the National Labor Relations Act, as amended (29 U.S.C. §§158(a) (5), 158(b) (3), and 158 (d)), require employers and labor organizations to bargain in good faith with respect to "wages, hours, and other terms and conditions of employment * * *." Pension plans fall within the category of "wages and other terms and conditions of employment," and are therefore mandatory subjects of bargaining under the National Labor Relations Act. *Inland Steel Co. v. NLRB,* 170 F.2d 247 (7th Cir. 1948), *cert. denied,* 336 U.S. 960 (1949).

Congress, in enacting the NLRA, refrained from specifying those aspects of labor relations which are not subject to state interference. Thus, a considerable body of

law has developed in which the courts have determined when state action affecting collective bargaining is impermissible. The United States Supreme Court recently reviewed and discussed these cases in *Lodge 76, Machinists v. Wisconsin Employment Relations Commission*, — U.S. —, 96 S.Ct. 2548 (1976).

Mr. Justice Brennan, speaking for the majority of the Court, noted the general division of cases into two categories:

> Cases that have held state authority to be preempted by federal law tend to fall into one of two categories: (1) those that reflect the concern that "one forum would enjoin, as illegal, conduct which the other forum would find legal" and (2) those that reflect the concern "that the [application of state law by] state courts would restrict the exercise of rights guaranteed by the Federal Acts." [*Machinists, supra*, — U.S. at —, 96 S.Ct. at 2552 (citation omitted).]

The decision in *Machinists* focused on the second category. The Wisconsin Employment Relations Commission had ordered a union to cease and desist from "authorizing, encouraging or condoning any considered refusal to accept overtime assignments" from the employer after the termination of the previous collective bargaining agreement, and during negotiations for a new agreement, and the Wisconsin courts had entered a judgment enforcing the Commission's order.[8] The *Machinists* appeal to the Supreme Court presented the question whether federal labor

[8] *Lodge 76, Machinists v. Wisconsin Employment Relations Commission*, 67 Wis. 2d 13, 226 N.W.2d 203 (1975).

policy preempted the authority of the state Labor Relations Board to enjoin a union and its members from refusing to work overtime in order to put economic pressure on the employer in negotiations for renewal of an expired collective bargaining agreement. The Court deemed this controversy as falling into the second line of preemption cases, *i.e.*, those "focusing upon the crucial inquiry whether Congress intended that the conduct involved be unregulated because 'left to be controlled by the free play of economic forces.' " *Machinists, supra*, —U.S. at —, 96 S.Ct. at 2553.

The Wisconsin Supreme Court in upholding the injunction had relied on the so-called *Briggs-Stratton* case, *Local 232 Automobile Workers v. Wisconsin Board*, 336 U.S. 245 (1949). *Briggs-Stratton* held that state power was not preempted as to peaceful conduct neither protected by §7 nor prohibited by §8 of the Act, a holding premised on the statement that "[t]his conduct is either governable by the state or it is entirely ungoverned." *Machinists, supra*, — U.S. at —, 96 S.Ct. at 2553, quoting *Briggs-Stratton, supra*, 336 U.S. at 254. The *Machinists* opinion observed that the underpinning of *Briggs-Stratton* had been undercut by subsequent decisions of the Court

> [f]or the Court soon recognized that a particular activity might be "protected" by federal law not only where it fell within § 7, but also when it was an activity that Congress intended to be "unrestricted by *any* governmental power to regulate" because it was among the permissible "economic weapons in reserve . . . actual exercise [of which] on occasion by the parties is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." NLRB v. Insurance Agents, 361 U.S. at 488, 489,

> 80 S.Ct. at 426, 427 (emphasis added). [*Machinists, supra,* — U.S. at —, 96 S.Ct. at 2553-54.]

The *Machinists* decision expressly overruled the *Briggs-Stratton* decision as having been worn away by contrary authority. *Machinists, supra,* — U.S. at —, 96 S.Ct. at 2560.

The *Machinists* case and the cases relied on in *Machinists*[9] considered the power of states to regulate conduct by employers and employees constituting economic weapons used in the collective bargaining process. The *Machinists* opinion deemed the Court's earlier decision in *NLRB v. Insurance Agents,* 361 U.S. 477 (1960), as substantial precedent for overruling *Briggs-Stratton.* In *Insurance Agents,* on-the-job activities by union members interfered with the employer's business, and thus put economic pressure on the employer to accede to the union's bargaining demands. The NLRB held that proof of these tactics justified its determination that the union had failed to bargain in good faith as required by §8(b) (3) of the NLRA. The Supreme Court disagreed:

> [A]part from this essential standard of conduct [good faith], Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences.
>
> * * *
>
> [I]f the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. As the parties' own devices became more limited, *the Government might have to enter even more directly into the negotiation of collective agreements. Our labor policy is not presently erected on a foundation of government control of the results of negotiations.* [*Insurance Agents, supra,* 361 U.S. at 488, 490 (emphasis added).]

[9]*See* cases cited at *Machinists, supra,* — U.S. at —, 96 S.Ct. at 2555.

Machinists, in its review of pertinent Supreme Court cases,[10] makes it abundantly clear that neither the states nor the National Labor Relations Board may attempt to influence the substantive terms of collective bargaining agreements by regulating the conduct of the parties to collective bargaining negotiations. These agreements are to be controlled by and left to the free play of economic forces. If states cannot control the economic weapons of the parties at the bargaining table, *a fortiori,* they may not directly control the substantive terms of the contract which results from that bargaining.

Appellant in seeking reversal relies heavily on *Local 24, Teamsters v. Oliver,* 358 U.S. 283 (1959). *Oliver* holds that by reason of the preemption doctrine, a state antitrust statute cannot apply to negate terms of a collective bargaining agreement setting wage rates. In that case, a collective bargaining agreement between a group of labor unions and a group of interstate motor carriers prescribed

[10]*See* cases cited in *Machinists, supra,* — U.S. at —, 96 St.Ct. at 2555-59. We, of course, here are not concerned with certain aspects of labor relations which courts have recognized as falling within the police power of the states, such as actual or threatened violence to persons, or destruction of property, or where the activity regulated is of peripheral concern to federal labor relations policy. *See Machinists, supra,* — U.S. at —, 96 S.Ct. at 2551, notes 2 and 3.

a wage scale for truck drivers and, in order to prevent evasion thereof, provided that truck owner-drivers should be paid, in addition to the prescribed wage, not less than a specified minimum rental for the use of their vehicles. Respondent Oliver, a truck owner-driver member of the union had obtained an injunction in the state court, affirmed by the Ohio Supreme Court, to prevent the motor carriers and the local union from carrying out the minimum rent provision on the ground that such term of the collective bargaining agreement violated Ohio antitrust laws. The Supreme Court reversed. The state antitrust law could not be applied to bar the contracting parties from carrying out of the terms of a collective bargaining agreement upon a subject as to which federal law directed them to bargain. The Court said:

> We must decide whether Ohio's antitrust law may be applied to prevent the contracting parties from carrying out their agreement upon a subject matter as to which federal law directs them to bargain. Little extended discussion is necessary to show that Ohio law cannot be so applied. * * * The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, is the promotion of collective bargaining; to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations and thereby to minimize industrial strife. See *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45; *Labor Board* v. *American National Ins. Co.*, 343 U.S. 395, 401-402. Within the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed. * * * [*Oliver, supra*, 358 U.S. at 295.]

Specifically focusing on the threatened impact of the state law on the collective bargaining process, the court said:

> To allow the application of the Ohio antitrust law here would wholly defeat the full realization of the congressional purpose. The application would frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving, and in the solution of which it imposed no limitations relevant here. Federal law here created the duty upon the parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement the parties made in response to that duty * * *; and federal law sets some outside limits (not contended to be exceeded here) on what their agreement may provide * * *. We believe that there is no room in this scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions. * * * Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State. * * * The solution worked out by the parties was not one of a sort which Congress has indicated may be left to prohibition by the several States. * * * We have not here a case of a collective bargaining agreement in conflict with a local health or safety regulation; the conflict here is between the

> federally sanctioned agreement and state policy which seeks specifically to adjust relationships in the world of commerce. If there is to be this sort of limitation on the arrangements that unions and employers may make with regard to these subjects, pursuant to the collective bargaining provisions of the Wagner and Taft-Hartley Acts, it is for Congress, not the States, to provide it. [*Oliver, supra,* 358 U.S. at 295-97 (citations omitted).]

The district court rejected *Oliver* as dispositive in this case, stating:

> Plaintiffs assert that a state's attempt to regulate a subject matter of collective bargaining, such as employee pensions, should not be permitted where that regulation conflicts with the colllective bargaining agreement.
>
> * * *
>
> State antitrust statutes present unique problems in the area of labor preemption. The Supreme Court has consistently held that the NLRA precludes their application to appropriate labor union activities. *See, e.g., Connell Construction Co. v. Plumbers & Steamfitters,* 421 U.S. 616 * * * (1975); *Weber v. Anheuser-Busch, Inc.,* 348 U.S. 468 * * * (1955). Antitrust laws are designed primarily to apply to business combinations and their application to collective action by employees would produce a direct conflict with the national labor policy.
>
> The Court has stated that:
>
>> [p]ermitting state antitrust law to operate in [the labor] field could frustrate the basic federal policies favoring employee organization and allowing elimination of competition among wage earners, and interfere with the detailed system Congress has created for regulating organizational techniques.
>
> *Connell, supra,* 421 U.S. at 636, 95 S.Ct. at 1842, 44 L.Ed.2d at 434.
>
> The inherent conflict and delicate balance which exists between labor and antitrust policy does not exist between labor policy and the regulation of pensions. Congress, in formulating its policies, has indicated that states may regulate pensions. Accordingly, the court concludes that the Minnesota Pension Act does not necessarily stand as an obstacle to the accomplishment of the purposes and objectives of Congress. The broad language of *Oliver* does not require the striking down of the Pension Act. [*White Motor Corp. v. Malone, supra,* 412 F. Supp. at 381.]

In our view, *Oliver* is not to be read so restrictively. We emphasize the Court's language:

> We believe there is no room in this scheme [of federal labor law] for the application here of the state policy limiting the solutions that parties' agreement can provide to the problems of wages and working conditions. [*Oliver, supra,* 358 U.S. at 296.]

Moreover, in *Labor Board v. Insurance Agents,* the Court cited *Oiver* in support of the following statement:

> But apart from this essential standard of conduct Congress intended that the parties should have wide latitude in their negotiations unrestricted by any

> governmental power to regulate the substantive solution of their differences. See *Teamsters Union* v. *Oliver, supra*, at 295. [*Insurance Agents, supra*, 361 U.S. at 488.]

The Supreme Court in *Machinists* also relied on specific language in *Oliver* as a basis for overruling *Briggs-Stratton*.

> Our decisions since *Briggs-Stratton* have made it abundantly clear that state attempts to influence the substantive terms of collective-bargaining agreements are as inconsistent with the federal regulatory scheme as are such attempts by the NLRB: "[s]ince the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State." *Local 24 of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A.F.L.-C.I.O. v. Oliver*, 358 U.S. 283, 296 * * * (1959). [*Machinists, supra*, — U.S. at —, 96 S.Ct. at 2559.]

Thus, *Oliver* stands for the general proposition that a state cannot modify or change an otherwise valid and effective provision of a collective bargaining agreement.

Finally, we turn to the district court determination that the federal Welfare and Pensions Plans Disclosure Act, Pub. L. No. 85-836, 72 Stat. 997 (1958) (codified at 29 U.S.C §301 *et seq.*) (Disclosure Act), expressly authorizes substantive state regulation of pension plans. The statutory language relied on by the district court is as follows:

> The provisions of this chapter * * * shall not be held to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of the United States or of any State affecting the operation or administration of employee, welfare, or pension benefit plans, or in any manner to authorize the operation or administration of such plan contrary to any such law. [29 U.S.C. §309(b).][11]

Neither this language nor statutory history suggests that Congress intended to regulate substantive provisions, performance of, or the funding of any employee benefit plan or to authorize such regulation by the states.

The express statutory language relied upon by the district court applies to duties and liabilities, civil or criminal, imposed upon persons operating and administering employee welfare or pension benefit plans to conserve and keep safe those funds. The legislative history emphasizes the limited purpose of this legislation and that the Act's provisions to not affect substantive terms of employee benefit plans. We turn to the Senate Report as the Senate Bill was passed in lieu of the House Bill. *See* 3 U.S. Code Cong. & Adm. News 4137 (1958). That Senate Report, in part, reads:

> Complete disclosure of the details of welfare and

---

[11]The Welfare & Pension Plans Disclosure Act has been superseded by the Employee Retirement Income Security Act (ERISA), a comprehensive pension reform law enacted on September 2, 1974. The ERISA specifically repealed the Pension Disclosure Act, 29 U.S.C. §1031, and replaced it with new reporting and disclosure provisions. 29 U.S.C. §§1021-1031. The district court noted:

> ERISA also sought to avoid all future questions of preemption by specifically providing for the superseding of all state laws relating to employee benefit plans. 29 U.S.C. §1144. Since ERISA with its preemption provision was enacted after the occurrences which give rise to the present case before the court, plaintiffs have not sought to avail themselves of any of its provisions of legislative history. [*White Motor Corp. v. Malone, supra*, 412 F. Supp. at 380 n. 6.]

pension plan operations provides the most effective single deterrent against abuses and the many other weaknesses of these plans. It would provide the greatest incentive to good management and investment policies and the best protection to the interests and rights of employees, employers, and the Government alike [*Id.* at 4153.]

In further discussion of the principles and purposes of the Senate Bill, the Report adds:

> S. 2888 provides for registration, reporting, and disclosure of the financial operations of all types of private employee welfare and pension benefit plans. It is designed to place the primary responsibility for the policing and improved operations of these plans upon the participants themselves, with a minimum of interference in the natural development and operation of such plans, to leave to the States the detailed regulations relating to insurance, trusts, and other phases of their operations, and to place the least possible burden by way of cost and otherwise upon the plans and upon the Federal Government. It is the policy of this bill to protect the revenues of the United States, the interests of participants in the plans, their beneficiaries, the employers and the public, and to conserve the moneys involved so as to assure their utilization for their intended purposes.
>
> The bill would give the employee-beneficiaries of these plans an accounting for the money they spend and which is spent in their behalf for future security benefits and permits them to appraise the merits of

> these plans, which in many cases are held out to them as a competitive inducement of employment. It would give the employee-beneficiaries protections comparable to those provided in other large-scale investment operations. It is designed to deter dishonesty, mismanagement, and waste by allowing public scrutiny of the financial operations of such plans, and it accomplishes disclosure of the finances of these plans in one operation for all purposes. [*Id.* at 4154-55.]

Additionally, the report discusses criminal penalties and, in that discussion, expressly negates any purpose of the enactment to regulate substantive provisions:

> Although making no attempt to regulate employee-benefit plans, the bill, in addition to the necessary authority to the Secretary of Labor to enforce the administration of the legislation, provides severe criminal sanctions for willful, false statements, the destruction of records, embezzlement, kick-backs, and other self-dealing. [*Id.* at 4157.]

Clearly, the preemption disclaimer provision of the Disclosure Act, §309(b), relates to state statutes governing those obligations of trust undertaken by persons managing, administrating, or operating employee benefit funds, the violation of which gives rise to civil and criminal penalties. Accordingly, no warrant exists for construing this legislation to leave to a state the power to change substantive terms of pension plan agreements.

The construction to the contrary pressed upon us by the appellee would turn upside down well-established labor law principles.

> An appreciation of the true character of national labor policy expressed in the NLRA and LMRA indicates that in providing a legal framework for union organization, collective bargaining, and the conduct of labor disputes, Congress struck a balance of protection, prohibition, and laissez faire in respect to union organization, collective bargaining, and labor disputes that would be upset if a state could also enforce statutes or rules of decision resting upon its views concerning accommodation of the same interests. [Cox, *Labor Law Preemption Revisited*, 85 Harv.L.Rev. 1337, 1352 (1972).]

The economic travail suffered by retirees of the former Minnesota Moline Company plant in Minneapolis, Minnesota, did not result from misapplication, misappropriation, or misuse of any pension trust funds. The employees' expectation of pension benefits remained subject to change by reason of changing economic conditions, because the employer reserved the right to terminate the plan. Blame cannot be attached to either the Union or the employer for the changed economic conditions which resulted in the closing of the Lake Street plant and the termination of the pension plan. The parties (union and employer) agreed upon a pension plan that was never fully funded, or otherwise guaranteed. We presume that the parties agreed to increase current wages, perhaps at the expense of adequately funding retirement benefits.

If the legislative solution presented here can be sustained, then in another day a differently-minded state legislature could take away from working people contract benefits obtained through hard, fair bargaining. We construe national

labor policy to mandate "hands off" by the states in this area of labor relations.

We reverse and remand for the entry of judgment in conformity with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

WHITE MOTOR CORPORATION and White Farm Equipment Company,

Plaintiffs,

v.

E. I. MALONE, Commissioner of Labor and Industry for the State of Minnesota,

Defendant.

No. 3-75 Civ. 162.

United States District Court,
D. Minnesota,
Third Division.
March 19, 1976.

MEMORANDUM AND ORDER

ALSOP, District Judge.

This matter is presently before the court on motions by all parties. Plaintiffs are seeking a summary judgment, or in the alternative, a preliminary injunction on Count I of the Amended Complaint; defendant is requesting the court to abstain. Plaintiffs have brought this action challenging the constitutionality of the Minnesota Private Pension Benefits Protection Act, Minn. Stat. §181B.01 *et seq.* (1974) (hereinafter the "Minnesota Pension Act").

Plaintiff White Motor Corporation (hereinafter "White Motor") is an Ohio corporation with its principal place of business in Cleveland, Ohio. White Farm Equipment Company (hereinafter "White Farm") is a Delaware corporation with its principal place of business in Oakbrook, Illinois and is a wholly owned subsidiary of White Motor.

The defendant, E. I. Malone, is the Commissioner of Labor and Industry for the State of Minnesota and is obligated to perform certain duties under the Minnesota Pension Act.

The facts giving rise to the dispute between the parties are lengthy. In 1962, White Motor organized a subsidiary, Minneapolis-Moline, Inc. Minneapolis-Moline,Inc. on January 1, 1963 acquired the assets of Motec Industries, Inc. (formerly called the Minneapolis-Moline Company) which had operated farm manufacturing plants at Hopkins, Minnesota and Minneapolis, Minnesota, on Lake Street. In 1969 Minneapolis-Moline, Inc. changed its name to White Farm. White Farm still operates the Hopkins plant but closed the Lake Street plant in June, 1972.

In 1950, a pension plan was established for the employees of the predecessor of White Farm. This pension plan was carried forward in some form in each of the subsequent years that collective bargaining agreements were entered into: 1954, 1959, 1962, 1965, 1968 and 1971. Since 1955, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and certain of its local unions (hereinafter collectively referred to as the "UAW") have been the bargaining representatives for production and maintenance employees and clerical employees at the Lake Street and Hopkins plants.[1] Pension benefits resulting from collective bargaining agreements continued to increase after the purchase of Motec Industries by White Motor in 1963.

[1]Prior to 1955, the employees were represented by Local 1146 of the United Electrical, Radio and Machine Workers of America.

The 1971 version of the pension plan is the plan pertinent to this action. The 1971 plan contained a provision, first inserted in the 1968 plan, requiring the funding of unpaid past service liability. Unpaid past service liability is at any given time, the excess of the accrued liability of the pension fund over the present value of the assets of the fund. The 1971 plan provided:

Section 9.05

> The unfunded net deficiency as of January 1, 1971 shall be amortized over a thirty-five (35) year period from January 1, 1971. The deficiencies resulting from benefit increases effective January 1, 1972 and January 1, 1973 shall be funded uniformly over a thirty-five (35) year period from January 1, 1972 and January 1, 1973 respectively.

Deferred funding of past service liability is a common feature of pension plans. In essence, past service liability is met by continued business operations and continued contributions by the employer to the pension fund. If the plan is terminated, the pension fund will not be increased and as a result some past service liability will remain unfunded.

In language unchanged since the 1950 pension plan, the 1971 plan provided for the payment of pensions as follows:

Section 6.09—Source of Pensions

> Pensions shall be payable only from the Fund and rights to pensions shall be enforceable only against the Fund.

* * * * * *

Section 6.17—No Other Benefits

> No benefits other than those specifically provided for are to be provided under this Plan. No employee shall have any vested right under the Plan prior to his retirement and then only to the extent specifically provided herein.

* * * * * *

Section 9.04—Rights of Employees in the Fund

> No employees, participant or pensioner shall have any right to, or interest in, any part of any Trust Fund created hereunder, upon termination of employment or otherwise, except as provided under this Plan and only to the extent therein provided. All payments of benefits as provided for in this Plan shall be made only out of the Fund or Funds of the Plan and neither the Company nor any Trustee nor any Pension Committee or Member thereof shall be liable therefore in any manner or to any extent.

During the 1968 and 1971 negotiations with UAW, Pension Guarantees applicable to the Lake Street and Hopkins plants were given by White Motor. These Guarantees provided that, upon termination of the pension plan, benefits were guaranteed by White Motor at a designated benefit level. By giving the Guarantees, White Motor assumed a direct liability of approximately $7,000,000.

After suffering substantial losses from 1969 to 1971 at its Minneapolis-Moline Division, White Motor in January, 1972 informed the UAW that it intended to close its Minneapolis-Moline plants. Operations at the Lake Street plant were terminated in June 1972 and the plant was

closed and the building subsequently razed. Operations at the Hopkins plant have continued.

Section 10.02 of the pension plan provided that "[t]he Company shall have the sole right at any time to terminate the entire Plan." Relying on this language, White Motor attempted to terminate the pension plan on June 30, 1972. The UAW challenged White Motor's attempt to terminate the plan prior to expiration of the collective bargaining agreement. An arbitrator's award and subsequent litigation upholding that award determined that the plan could not be terminated until the expiration of the collective bargaining agreement on May 1, 1974.[2] The pension plan was thereafter terminated on May 1, 1974.

At the time the Lake Street plant was closed, the pension fund was only partially funded and there was a net deficiency in the fund of approximately $14,000,000.

As of January 1, 1975 there were 981 retirees under the pension plan and 233 persons eligible for deferred pensions by reason of having attained age 40 and 10 years of service at the time of the termination of their employment with White Farm. In addition there were 44 terminated employees who at the time of the termination of their employment had 10 years of service but had not attained the age of 40. Ten years of continuous service is the minimum number of years an employee must have worked for White Motor before becoming eligible for benefits under the plan, but to be so eligible, he must also have attained the age of 40. As of January 1, 1975 there were 260 active employees at the Hopkins plant who were participants in the plan.

---

[2] *See, International Union, etc. v. White Motor Corp.*, 505 F.2d 1193 (8th Cir. 1974).

On April 10, 1974, the Minnesota Pension Act, Minn. Stat. §181B.01 *et seq.*, was enacted into law. The title of the Act describes it as

> "[a]n act relating to private pensions; imposing an obligation upon certain employers who terminate pension plans; providing for the enforcement and method of payment of such obligations." Minn. Laws 1974, ch. 437.

Minn. Stat. §§181B.03-.06 impose a "pension funding charge" directly against any employer who ceases to operate a place of employment or a pension plan. Such charge shall be equal in amount to the vested and nonvested benefits described in the statutory provisions. These sections essentially provide that any employee who has completed ten or more years of credited service under a pension plan has, upon termination of that plan or of his place of employment, an automatically vested right to all pension benefits he would have received had the particular plan not been terminated or had the place of business not been closed.

Minn. Stat. §§181B.09-.12 provide that the Commissioner of Labor and Industry, after investigation, shall certify amounts owing by an employer. That certified amount is declared, under §181B.11, to "be a lien upon the employer's assets." The pension funding charge is used to purchase an annuity payable to the employee when he reaches normal retirement age.

Pursuant to the provisions of the Pension Act, Malone notified White Motor and White Farm on August 18, 1975 that they owed a pension funding charge of $19,150,053.

Plaintiffs contend that the Pension Act conflicts with

the pension plan in the following manner: (1) the Act provides employees vested rights to pension benefits which would not be available under the plan. Compare §§181B.-03-.06 with Sections 6.17 and 9.04 of the plan; (2) to the extent of any deficiency in the pension fund, the Act requires satisfaction of pension benefits from the general funds of the employer. §§181B.03-.06. The pension plan provides that benefits shall be paid only out of the pension fund and that the Company shall not be liable to any extent. Sections 6.09 and 9.04 of the plan; and (3) the Act completely changes the consequences of teminating the pension plan.

PROCEDURAL POSTURE

Plaintiffs filed their original complaint in May, 1975 alleging that the Minnesota Pension Act is unconstitutional on several grounds. In July, 1975 plaintiffs amended their complaint to include an allegation that the Act is in conflict with the provisions and policies of the National Labor Relations Act, 29 U.S.C. §151 *et seq.*, and thus is preempted under the Supremacy clause of the United States Constitution.[3]

Plaintiffs have moved for a partial summary judgment solely on their preemption claim. Fed. R.Civ. P. 56. In the alternative, plaintiffs seek a preliminary injunction, also based only on the preemption claim, to enjoin the enforcement of the Minnesota Pension Act by the defendant. Defendant has moved the court to abstain from hearing this action pending state construction of the Minnesota Pension Act.

[1-3] The plaintiffs' amended complaint seeks only a declaratory judgment that the Pension Act is invalid.

[3]Art. VI, cl. 2.

The motion for partial summary judgment for declaratory relief is properly heard by a single judge. Plaintiffs' alternative request for a preliminary injunction is carefully based only on preemption. A request for an injunction based on a preemption challenge to a state statute does not require the convening of a three-judge court. *Swift & Co. v. Wickham*, 382 U.S. 111, 86 S. Ct. 258, 15 L. Ed. 2d 194 (1965). Furthermore, where a statute is challenged both on preemption grounds and other constitutional grounds, the court, sitting as a single judge, should decide the preemption issue first. *Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed. 2d 577 (1974).

The scope and the basis of relief sought is significant for it differs with the relief sought in *Fleck et al. v. Spannaus et al.*, (File No. 3-75 Civ. 178) 412 F. Supp. 366 (D. Minn. 1976), also issued today. The court expended considerable effort in attempting to place the two cases in an identical procedural posture and reluctantly concludes that its attempt to produce a "Brobdingnagian" result was unsuccessful.[4]

Fed. R. Civ. P. 56(c) provides that summary judgment is proper where "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Minnesota Bearing Co. v. White Motor Corp., 470 F. 2d 1323 (8th Cir. 1973), sets forth the standard for the issuance of a preliminary injunction:

[4]Professor Chafee once wrote, "The King of Brobdingnag gave it for his opinion that, 'whoever could make two ears of corn, or two blades of grass to grow upon a spot of ground where only one grew before, would deserve better of mankind, and do more essential service to his country than the whole race of politicians put together." In matters of justice, however, the benefactor is he who makes one lawsuit grow where two grew before." *Bills of Peace with Multiple Parties*, 45 Harv.L.Rev. 1297 (1932).

> In order to justify the issuance of a preliminary injunction by the trial court, the movant has the burden of showing: (1) substantial probability of success at trial by the moving party, and (2) the irreparable injury to the moving party absent such issuance. Other factors which may be considered in the decision to grant or to deny the request are the absence of substantial harm to other interested parties, and the absence of harm to the public interest.

470 F. 2d at 1326.

The court will examine defendant's motion to abstain before considering plaintiffs' alternative motions of summary judgment or preliminary injunction.

ABSTENTION

Defendant has moved for abstention on the grounds that state administrative or court proceedings may eliminate or substantially modify plaintiffs' federal challenge to the Act.

[4, 5] Abstention cases have generally ". . . dealt with unresolved questions of state law which only a state tribunal could authoritatively construe." *Wisconsin v. Constantineau,* 400 U.S. 433, 438, 91 S. Ct. 507, 511, 27 L. Ed. 2d 515, 520 (1971). Abstention is justified where the state statute is susceptible to a clarifying construction that would alter or eliminate the constitutional question. *Lake Carriers' Ass'n v. MacMullan,* 406 U.S. 498, 510, 92 S. Ct. 1749, 1757, 32 L. Ed. 2d 257, 268 (1972); *Zwickler v. Koota,* 389 U.S. 241, 249, 88 S. Ct. 391, 396, 19 L. Ed. 2d 444, 451 (1967). It is not proper to abstain ". . . simply to give state courts the first oppor-

tunity to vindicate the federal claim." *Zwickler v. Koota, supra* at 251, 88 S. Ct. at 397, 19 L. Ed. 2d at 452.

Defendant has failed to indicate to the court any statutory provisions involved in this case which might be construed by a state court so as to modify the federal question being considered. Nor has defendant contended that the state administrative proceeding might relieve plaintiffs of any liability. The present controversy requires the court to construe a federal law, a task which is best performed by a federal court. *See Chemical Specialties Manufacturers Ass'n v. Lowery,* 452 F. 2d 431, 433 (2d Cir. 1971).

Accordingly, defendant's motion to abstain will be denied.

SUMMARY JUDGMENT

Plaintiffs contend that they are entitled to summary judgment on the grounds that the Minnesota Pension Act is in conflict with, and preempted by, the provisions and policies of the National Labor Relations Act, as amended, 29 U.S.C. §§151, 157, 158(a)(5), 158(b)(3), and 158(d). Section 7 of the National Labor Relations Act, 29 U.S.C. §157, (hereinafter NLRA) establishes the right of employees to form and join labor organizations and to bargain collectively through representatives of their own choosing. Sections 8(a)(5), 8(b)(3) and 8(d) of the NLRA require employers and labor organizations to bargain in good faith with respect to "wages, hours and other terms and conditions of employment. . . ."

[6] It has been established that pension plans fall within the category of "wages and other terms and conditions of employment", and are therefore mandatory subjects of bargaining under the NLRA. *Inland Steel Co. v. NLRB,* 170 F. 2d 247 (7th Cir. 1948), *cert. denied,* 336

U.S. 960, 69 S. Ct. 887, 93 L. Ed. 1112 (1949). Plaintiffs assert that since they were required to bargain in good faith over pension benefits and having reached an agreement on a pension plan, a state statute which conflicts with the terms of that agreement infringes on the national policy of collective bargaining and thus has been preempted under the Supremacy clause by the statutes embodying federal labor policy.

The concept of preemption was explained in *Amalgamated Ass'n of Street Employees v. Lockridge*, 403 U.S. 274, 285-286, 91 S. Ct. 1909, 1917, 29 L. Ed. 2d 473, 482 (1971), where the Court stated:

> The constitutional principles of preemption in whatever field of law they operate, are designed with a common end in view: to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter.

The method for determining whether a conflict exists has been addressed by the Supreme Court:

> Deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict.

Perez v. Campbell, 402 U.S. 637, 644, 91 S. Ct. 1704, 1708, 29 L. Ed. 2d 233, 239 (1971).

Construction of the Statutes

The Minnesota Pension Act has not been construed by any judicial body—state or federal. However, an analysis of the Act indicates the protection it seeks to provide.

The title of the Act describes it as

> "[a]n act relating to private pensions; imposing an obligation upon certain employers who terminate pension plans; providing for the enforcement and method of payment of such obligations." Minn. Laws 1974, ch. 437.

Through the imposition of a "pension funding charge", the Act protects employees with ten or more years of credited service under a pension plan from forfeiture of those pension benefits. Minn. Stat. §§181B.03-.06. The protection is provided by using the pension funding charge to purchase an annuity that will provide the protected employee with monthly pension benefits after his normal retirement age. Minn. Stat. §181B.12. The pension funding charge is assessed directly against the employer when it ceases to operate a place of employment in Minnesota leaving a substantial number of employees unemployed, or if it terminates a pension plan. Minn. Stat. §§181B.03-.06.

The NLRA has been authoritatively construed by the Supreme Court on numerous occasions. It has been described as " . . a comprehensive code passed by Congress to regulate labor relations in activities affecting interstate and foreign commerce." *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238, 88 S.Ct. 362, 365, 19 L.Ed. 2d 438, 442 (1967).

The NLRA is

". . . designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers. The Act does not compel any agreement whatsoever between employees and employers. Nor does the Act regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement." [footnotes omitted]

Labor Board v. American National Insurance Co., 343 U.S. 395, 401-402, 72 S.Ct. 824, 828, 96 L.Ed. 1027, 1036 (1952); *See Labor Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45, 57 S.Ct. 615, 628, 81 L.Ed. 893, 916 (1937).

Question of Conflict

With the construction of the statutes considered, the question presented is whether state regulation of pensions is in conflict with and thus preempted by the NLRA and its policies.

1. Labor Law Preemption

The well developed laws surrounding labor preemption has focused on primarily two areas: (1) regulation of labor-management relations and labor disputes, and (2) regulation of conduct of a union towards an individual member. *See Cox, Labor Law Preemption Revisited*, 85 Harv.L.Rev. 1337 (1972). As a consequence, the "test" for determining whether State decisional or statutory law is preempted is a result of litigation in those areas. The principles established in those cases are helpful in analyzing the claims of the plaintiffs herein, but nonetheless the court is still left with a case of first impression concerning

the permissible extent of state regulation of employee pension funds.

The established standard for labor law preemption was enunciated in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed. 2d 775 (1959). In *Garmon* the Supreme Court overturned a state court's award of damages for economic injuries resulting from peaceful picketing. The status of the picketing was uncertain under the NLRA since the Labor Board had not ruled on the question. The court explained its restriction on state court jurisdiction saying:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. . . .
>
> At times it has not been clear whether the particular activity regulated by the States was governed by §7 or §8 or was, perhaps, outside both these sections. . . . When an activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

The *Garmon* "arguably protected or prohibited" test was reaffirmed in *Amalgamated Ass'n of Street Employ-*

ees v. Lockridge, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed. 2d 473 (1971), in the context of an employee-union controversy.

Section 7 prescribes the protected rights of employees. There are no employees party to the present action contending that their rights have been interfered with.

Section 8 of the NLRA requires employers and labor organizations to bargain in good faith over "wages, hours and other terms and conditions of employment . . .", which would include pensions.

The employer's duty to bargain in good faith over pensions is not altered by the Pension Act. The Pension Act does not require labor and management to agree to a pension plan or that specific provision be included in a pension plan.

[7] The NLRA does not regulate the substantive terms of a collective bargaining agreement. *Labor Board v. American National Insurance Co., supra,* 343 U.S. at 402, 72 S.Ct. at 828, 96 L.Ed. at 1036.

[8] The danger addressed in *Garmon* is not presented by the facts of the present action. The state is not attempting to regulate a subject matter which lies within the exclusive competence of the National Labor Relations Board. The Pension Act does not

> ". . . regulate conduct so plainly within the central aim of federal regulation involv[ing] too great a danger of conflict between power asserted by Congress and requirements imposed by state law. . . ." *Garmon, supra,* 359 U.S. at 244, 79 S.Ct. at 779, 3 L.Ed. 2d at 782.

2. Congressional Intent

[9] Although the Pension Act does not seem on its face to conflict with the regulatory scheme of the NLRA, it is nonetheless the court's function

> ". . . to determine whether [the] challenged state statute 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941). [further citations omitted]

Perez v. Campbell, supra, 402 U.S. at 649, 91 S.Ct. at 1711, 29 L.Ed. 2d at 642.

Plaintiffs contend that the purpose and objective of Congress which is being frustrated by the Pension Act is the collective bargaining process. This frustration allegedly occurs because labor and management agreed to a provision in a collective bargaining agreement covering the termination of the pension plan and now the State of Minnesota seeks to apply a law which would effectively alter the agreed-to provision.

[10] A court cannot ". . . declare pre-empted all local regulation that touches and concerns in any way the complex interrelationships between employees, employers, and unions; obviously much of this is left to the States." *Lockridge, supra,* 403 U.S. at 289, 91 S.Ct. at 1920, 29 L.Ed. 2d at 484. It is recognized that Congress developed its special framework of labor laws within a larger context of state laws which provide for rights of property, public order and the promotion of public health and welfare. Cox, *Labor Law Preemption Revisited, supra,* at 1355.

[11] In examining Congressional intent it should be recognized that "the principle of pre-emption that informs our general national labor law was born of [the Supreme] Court's efforts, without the aid of explicit congressional guidance. . . ." *Lockridge, supra,* 403 U.S. at 286, 91 S.Ct. at 1918, 29 L.Ed. 2d at 482. Although Congress has not given explicit guidance in the NLRA of the extent that it desired to preempt state laws of the type here being challenged, it has given indications in other laws that legislation and regulation by the States of various subject matter would be permissible.

For example, Congress indicated in the Fair Labor Standards Act, 29 U.S.C. §201 *et seq.* that States could establish a higher minimum wage than was required by federal law.[5] Such state requirements can be imposed even though wages are a mandatory subject of collective bargaining.

In a similar vein, the Supreme Court looked to Congress' affirmative indications in another enactment when it held that an employee could bring an action in state court against his employer for breach of a collective bargaining agreement even though the employer's action was an unfair labor practice under Section 8 of the NLRA

[5]Section 18(a) of that Act, 29 U.S.C. §218(a) provides as follows:

> No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter, and no provision of this chapter relating to the employment of child labor shall justify noncompliance with a Federal or State law or municipal ordinance establishing a higher standard than the standard established under this chapter. No provision of this chapter shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this chapter, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this chapter.

and thus within the jurisdiction of the National Labor Relations Board. *Smith v. Evening News Association,* 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed. 2d 246 (1962).

Relevant to the state statute being challenged by the plaintiffs was the expression of Congressional intent for state regulation of pensions when Congress enacted the Welfare and Pension Plans Disclosure Act (hereinafter the "Pension Disclosure Act"), 29 U.S.C. §301 *et seq.*[6] Congress expressly provided that states should remain free to become involved in the regulation of pension plans when it stated:

> The provisions of this chapter . . . shall not be held to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law . . . of any State affecting the operation or administration of employee . . . pension benefit plans. . . .

29 U.S.C. §309(b).

The legislative history of the Pension Disclosure Act further emphasizes the regulatory power retained by the states. The Senate Report stated:

[6]The Pension Disclosure Act was the controlling pension statute in effect when the Minnesota Pension Act was enacted. Subsequently, the Employee Retirement Income Security Act (ERISA), a comprehensive pension reform law, was enacted by Congress. 29 U.S.C. §1001 *et seq.* ERISA specifically repealed the Pension Disclosure Act, 29 U.S.C. §1031, and replaced it with new reporting and disclosure provisions. 29 U.S.C. §§1021-1031.

ERISA also sought to avoid all future questions of preemption by specifically providing for the superseding of all state laws relating to employee benefit plans. 29 U.S.C. §1144. Since ERISA with its preemption provision was enacted after the occurrences which give rise to the present case before the court, plaintiffs have not sought to avail themselves of any of its provisions or legislative history. Compare with *Fleck et al. v. Spannaus et al.,* 412 F. Supp. 366 (D.Minn. 1976), also issued today.

> . . . [The Pension Disclosure Act] is a disclosure statute and by design endeavors to leave *regulatory responsibility to the States.*
>
> * * * * * *
>
> . . . It is designed to place the primary responsibility for the policing and improved operations of these plans upon the participants themselves, with a minimum of interference in the natural development and operation of such plans, *to leave to the States the detailed regulations relating to insurance, trusts, and other phases of their operations,* and to place the least possible burden by way of cost and otherwise upon the plans and upon the Federal Government. [emphasis added]

S. Rep. No. 1440, 85th Cong., 2d Sess. (1958), 1958 *U.S. Code Cong. and Adm. News* 4137, 4153-4154.

Moreover, Congress was specifically aware that pension plans were often the product of the collective bargaining process. *See, e.g.,* S. Rep. No. 1440, 85th Cong., 2d Sess. (1958), 1958 *U.S. Code Cong. and Adm. News* 4137, 4143-4144; H.Rep. No. 2283, 85th Cong., 2d Sess. (1958), 1958 *U.S. Code Cong. and Adm. News* 4181, 4188-4189. Thus Congress was not unmindful that it was permitting States to regulate a subject matter which was the product of collective bargaining.

3. Collective Bargaining Agreement

Plaintiffs assert that a state's attempt to regulate a subject matter of collective bargaining, such as employee pensions, should not be permitted where that regulation conflicts with the collective bargaining agreement.

In support of their position, plaintiffs place heavy reliance on *Local 24, Teamsters v. Oliver,* 358 U.S. 283, 79 S.Ct. 297, 3 L.Ed. 2d 312 (1959).

In *Oliver* a group of local labor unions had entered into a collective bargaining agreement with a group of interstate motor carriers providing the wage scale for truck drivers and the minimum rental for drivers who used their own vehicles. A state court enjoined certain carriers and a local union from carrying out the minimum rental provision on the grounds that it violated state antitrust law. However, the Supreme Court held that state antitrust law could not be applied to prohibit the parties from carrying out the terms of its collective bargaining agreement. The Court stated:

> To allow the application of the Ohio antitrust law here would wholly defeat the full realization of the congressional purpose. The application would frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving, and in the solution of which it imposed no limitations relevant here.

358 U.S. at 295-296, 79 S.Ct. at 304, 3 L.Ed. 2d at 321.

State antitrust statutes present unique problems in the area of labor preemption. The Supreme Court has consistently held that the NLRA precludes their application to appropriate labor union activities. *See, e.g. Connell Construction Co. v. Plumbers & Steamfitters,* 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed. 2d 418 (1975); *Weber v. Anheuser-Busch, Inc.,* 348 U.S. 468, 75 S.Ct. 480, 99 L.Ed. 546 (1955). Antitrust laws are designed primarily to apply to business combinations and their application to collective

action by employees would produce a direct conflict with the national labor policy. The Court has stated that:

> [p]ermitting state antitrust law to operate in [the labor] field could frustrate the basic federal policies favoring employee organization and allowing elimination of competition among wage earners, and interfere with the detailed system Congress has created for regulating organizational techniques.

Connell, supra, 421 U.S. at 636, 95 S.Ct. at 1842, 44 L.Ed. 2d at 434.

[12] The inherent conflict and delicate balance which exists between labor and antitrust policy does not exist between labor policy and the regulation of pensions. Congress, in formulating its policies, has indicated that states may regulate pensions. Accordingly, the court concludes that the Minnesota Pension Act does not necessarily stand as an obstacle to the accomplishment of the purposes and objectives of Congress. The broad language of *Oliver* does not require the striking down of the Pension Act.

Plaintiffs have also relied on the following cases which merit comment: *Railway Employees' Dept. v. Hanson,* 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956); *California v. Taylor,* 353 U.S. 553, 77 S.Ct. 1037, 1 L.Ed. 2d 1034 (1957); *United Air Lines, Inc. v. Industrial Welfare Comm'n,* 211 Cal. App. 2d 729, 28 Cal. Rptr. 238 (1963). Although it may not be a significant distinction, all of the above cases were decided under the Railway Labor Act, 45 U.S.C. §151 *et seq.* An important distinction, however, is that none of the cases dealt with a state's efforts to regulate a subject matter which Congress had specifically indicated they could regulate. The court also finds per-

suasive the distinction of the cases on their facts and the quality of state regulation involved as argued by the defendant in its supporting memoranda.

Based upon the foregoing, the court is not persuaded that the NLRA and its policies preempt the state regulation of pensions embodied in the Minnesota Pension Act. The court is not ruling on the validity of the Pension Act vis-a-vis any other law or constitutional provision since none has been presented to it. Plaintiffs' motion for summary judgment will be denied.

PRELIMINARY INJUNCTION

In the alternative, plaintiffs have moved for a preliminary injunction against the defendant. Plaintiffs have so moved on the same grounds as their request for summary judgment-preemption. Based on the analysis of the law recited above in denying plaintiffs' motion for summary judgment, the court concludes that plaintiffs have not shown a substantial probability of success at trial and thus plaintiffs' request for a preliminary injunction will also be denied. The foregoing recitation of facts and statement of law shall constitute the court's Findings of Fact and Conclusions of Law in accordance with Fed.R.Civ.P. 52(a).

Upon the foregoing,

IT IS ORDERED That defendant's motion to abstain be, and the same hereby is in all respects denied.

IT IS FURTHER ORDERED That plaintiffs' motion for an order granting summary judgment in favor of plaintiffs, and against defendant, on issues tendered in Count I of plaintiffs' Amended Complaint be, and the same hereby is in all respects denied.

IT IS FURTHER ORDERED That plaintiffs' motion for an order granting a preliminary injunction, upon the grounds set forth in Count I of the Amended Complaint, enjoining the defendant, his agents, representatives and employees, from assessing or certifying a pension funding charges against plaintiffs under the Minnesota Private Pension Act, Minn. Stat. Ch. 181B, and from taking or continuing to take any other action to enforce said statute against plaintiffs, pending a final determination of this cause by this court, be, and the same hereby is in all respects denied.

APPENDIX C

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 76-12266 September Term, 1976

White Motor Corporation and White Farm Equipment Company, Appellants,

vs.

E. I. Malone, Commissioner of Labor and Industry for the State of Minnesota, Appellee.

JUDGMENT

APPEAL FROM the United States District Court for the District of Minnesota

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Minnesota and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed.

And it is further ordered by this Court that this cause be and is hereby remanded to the said District Court for proceedings consistent with the opinion of this Court this day filed herein.

December 2, 1976.

A true copy.

Attest:

/s/ Robert C. Tucker
Clerk, U.S. Court of Appeals, 8th Circuit.

APPENDIX D

CHAPTER 181B
PRIVATE PENSION BENEFITS PROTECTION

181B.01 CITATION. Sections 181B.01 to 181B.-17 shall be known and may be cited as the "private pension benefits protection act".

181B.02 DEFINITIONS. Subdivision 1. As used in sections 181B.01 to 181B.17, the following terms shall have the meanings given.

Subd. 2. "Employer" means any person, firm or corporation who employs 100 or more people at least one of whom is employed in this state at any time within one year prior to the date that it ceases to operate a place of employment or a pension plan or such longer period as may be prescribed by the commissioner pursuant to section 181B.14.

Subd. 3. "Place of employment" means any location within this state at which an employer employs any employees at any time within one year prior to the date that the employer ceases to operate at such location or such longer period as may be prescribed by the commissioner pursuant to section 181B.14.

Subd. 4. "Employee" means any person employed at the place of employment at any time within one year prior to the date when the employer ceases to operate the place of employment or a pension plan or such longer period as may be prescribed by the commissioner pursuant to section 181B.14. "Employee" also means any person who is not employed by the employer but who was formerly employed in this state, and is eligible or will be eligible without the earning of additional pension credits to receive a pension benefit from the employer's pension plan.

Subd. 5. "Commissioner" means the commissioner of labor and industry.

Subd. 6. "Ceases to operate a place of employment or a pension plan" means:

(a) The complete termination of operations at a place of employment, or

(b) A substantial reduction in the number of employees at a place of employment, or

(c) The termination or substantial reduction of pension plan operations or benefits for all or a portion of an employer's employees.

The term shall not mean any temporary cessation of operations or reduction of employees. Neither shall the term mean any cessation of operations by a single employer who participates in a pension plan to which more than one employer makes contributions if such cessation does not also entail the termination of the master pension plan. In determining whether any reduction has been substantial the commissioner shall take into consideration not only the absolute size of the reduction but the relative size of the reduction as it relates to the corporate and employment history of the group or subgroup suffering the reduction. In addition, the commissioner may find that a number of unsubstantial reductions are, for the purposes of sections 181B.01 to 181B.17, equivalent to a substantial reduction. When an employer ceases to operate a place of employment or a pension plan but offers to retain without loss of pension credit all of the employees in comparable jobs with equal or increased compensation at another location within the state or at some other location outside this state as specified in any voluntary agreement authorized by section 181B.10, sections 181B.01 to 181B.17 shall not apply except as it affects persons not employed by the employer but who are eligible or will be eligible without the earning of additional pension credits to receive the pension benefits from the employer's pension plan.

Subd. 7. "Pension plan" means any plan, fund or program which is established, maintained or entered into by an employer for the purpose of providing retirement benefits for its employees, or their beneficiaries and which is designated as a qualified pension plan under section 401 of the United States Internal Revenue Code of 1954 as amended, but does not mean any plan established by collective bargaining agreement which is excluded from the coverage of 29 U.S.C. 186(c) (5) (B) by 29 U.S.C. 186(g) and for which the employer has no administrative responsibility and no responsibility for the establishment of the retirement benefit schedule. Sections 181B.01 to 181B.-17 shall not apply to any retirement fund or program providing benefits only for public employees of the federal government or the state government or a subdivision of the state, nor shall it apply to any pension plan established on behalf of a religious, charitable, or educational organization as defined by Section 501(c) (3) of the United States Internal Revenue Code of 1954 as amended. Further, sections 181B.01 to 181B.17 shall not apply to any money purchase, profit sharing, or stock bonus plan in which no definitely determinable level of benefits is stipulated to be given to qualified plan participants at normal retirement age or some other age.

Subd. 8. "Normal retirement benefit" means that benefit payable under a pension plan in the event of retirement at the normal retirement age.

Subd. 9. "Normal retirement age" means the lesser of either the normal retirement age as prescribed by the pension plan or age 65.

Subd. 10 "Accrued portion of the normal retirement

benefit" with respect to employees of ten or more years of covered service means the larger of either the present value of the pension benefit which the employee has earned prior to cessation under the terms of the pension plan itself or the present value of the normal retirement benefit to which the employee would be entitled under the plan as in effect on the date of the cessation if he continued to earn pension credits based on the covered service he would have accumulated had he continued as a plan participant until normal retirement age or if he continued to earn annually until normal retirement age the same rate of compensation as that which he had been earning prior to cessation, upon which his pension credit would have been computed under the plan at the rate specified by the plan for the years subsequent to the cessation, multiplied by a fraction not to exceed one, the numerator of which is the total number of his years of covered service as of the date of cessation, and the denominator plan as of normal retirement age if he had continued to be an active participant in the plan until attaining such age.

With respect to employees with less than ten years of covered service, the defining term means the present value of the total amount of pension benefits which have been vested on or prior to the date of cessation. Where the above formulas are inapplicable or inequitable the defined term means that portion of the normal retirement benefit to which the commissioner determines actuarially the employee should be entitled based on the covered service of the employee, as of the date of the cessation.

Subd. 11. "Covered service" means the longer of either:

(a) The period of employment with an employer including predecessor employers as allowed in section 181B.07, clause (1) which is recognized under the terms of the employer's pension plan for the purposes of determining either an employee's eligibility to receive benefits under the plan or the amount of such benefits, or

(b) The amount of time after institution of the present pension plan or any substantially similar predecessor plan that an employee has been continuously employed in a full time capacity by an employer including predecessor employers as allowed in Section 181B.07, clause (1) prior to the cessation of operations. Temporary and seasonal layoffs and unpaid vacations and leaves of absence need not be credited as covered service but neither shall they serve to interrupt an employee's continuity of service. Part time employment may be credited as covered service if the commissioner determines that a previous full time employee has been reduced to part time status as part of a plan to evade provisions of sections 181B.01 to 181B.17.

Subd. 12. "Vested right" means a legal right obtained by an employee participating in a pension plan to that part of an immediate or deferred pension benefit which arises from the employee's covered service under the plan and is no longer contingent on the employee remaining covered under the plan.

Subd. 13. "Vested pension benefit" means that accrued portion of the normal retirement benefit of an employee

participating, or who has participated, in a pension plan to which the employee has a vested right.

Subd. 14. "Nonvested pension benefit" means the accrued portion of the normal retirement benefit of an employee participating in a pension plan to which the employee does not have a vested right.

Subd. 15. "Present value of the total amount of nonvested pension benefits" means that sum of money which if earning interest in a secure investment from the date of cessation of operations onward would equal the value of the nonvested pension benefit on the date on which the plan participant reached normal retirement age.

Subd. 16. "Present value of the total amount of vested pension benefits" means that sum of money which if earning interest in a secure investment from the date of cessation of operations onward would equal the value of the vested pension benefit on the date on which the plan participant reached normal retirement age minus that sum of money which is set aside in trust or exclusively reserved to finance pension benefits for plan participants.

Subd. 17. "Present value of the normal retirement benefit" means that sum of money which if earning interest in a secure investment from the date of the cessation of operations onward would equal the value of the normal retirement benefit on the date on which the plan participant reached normal retirement age.

181B.03 PENSION REFUNDING CHARGE, VESTED BENEFITS PRIOR TO PENSION BENEFITS PROTECTION ACT. Every employer who hereafter ceases to operate a place of employment or a pension plan

within this state shall owe to his employees covered by sections 181B.01 to 181B.17 a pension funding charge which shall be equal to the present value of the total amount of vested pension benefits based upon covered service occurring before April 10, 1974 of such employees of the employer who have completed ten or more years of any covered service under the pension plan of the employer and whose vested pension benefits have been or will be forfeited because of the employer's ceasing to operate a place of employment or a pension plan, less the amount of such vested pension benefits which are compromised or settled to the satisfaction of the commissioner as provided in sections 181B.01 to 181B.17.

181B.04 NONVESTED BENEFITS PRIOR TO ACT. Every employer who hereafter ceases to operate a place of employment or a pension plan within this state shall owe to his employees covered by sections 181B.01 to 181B.17 a pension funding charge which shall be equal to the present value of the total amount of nonvested pension benefits based upon service occurring before April 10, 1974 of such employees of the employer who have completed ten or more years of any covered service under the pension plan of the employer and whose nonvested pension benefits have been or will be forfeited because of the employer's ceasing to operate a place of employment or a pension plan, less the amount of such nonvested pension benefits which are compromised or settled to the satisfaction of the commissioner as provided in sections 181B.-01 to 181B.17.

181B.05 VESTED BENEFITS UNDER ACT. Every employer who hereafter ceases to operate a place of employment or a pension plan within this state shall

owe to his employees covered by sections 181B.01 to 181B.17 a pension funding charge which shall be equal to the present value of the total amount of vested pension benefits based upon covered service occurring after April 10, 1974 of such employees of the employer who have completed ten or more years of any covered service under the pension plan of the employer and whose vested pension benefits have been or will be forfeited because of the employer's ceasing to operate a place of employment or a pension plan, less the amount of such vested pension benefits which are compromised or settled to the satisfaction of the commissioner as provided in sections 181B.01 to 181B.17.

181B.06 NONVESTED BENEFITS UNDER ACT. Every employer who hereafter ceases to operate a place of employment or a pension plan within this state shall owe to his employees covered by sections 181B.01 to 181B.17 a pension funding charge which shall be equal to the present value of the total amount of nonvested pension benefits based upon covered service occurring after April 10, 1974, of such employees of the employer who have completed ten or more years of any covered service under the pension plan of the employer and whose nonvested pension benefits have been or will be forfeited because of the employer's ceasing to operate a place of employment or a pension plan, less the amount of such nonvested pension benefits which are compromised or settled to the satisfaction of the commissioner as provided in sections 181B.01 to 181B.17.

181B.07 EXCEPTIONS TO PENSION FUNDING REQUIREMENTS. An employer shall not be liable for any pension funding charge under sections 181B.03 to

181B.06 when (1) the employer ceases to operate a place of employment or a pension plan as a result of merger, consolidation, or acquisition of assets, if the successor to the employer continues the pension plan of the employer or establishes a comparable pension plan which covers all previously covered employees of the employer with no reduction in credited covered service for purposes of sections 181B.01 to 181B.17 and no reduction in the value of the pension credits already earned by the employees; or (2) the employer ceasing to operate a place of employment or a pension plan has (a) in each of the five years prior to cessation made a contribution to the pension plan at least equal to the maximum contribution which would have been exempt from income taxation under Section 404 of the United States Internal Revenue Code of 1954 as amended, or (b) in at least eight of the ten years immediately prior to cessation made a contribution to the pension plan at least equal to the maximum contribution which would have been exempt from income taxation under Section 404 of the United States Internal Revenue Code of 1954 as amended, or (c) when the pension plan has been instituted less than five years prior to cessation, in every year since the institution of the plan, made a contribution to the pension plan at least equal to the maximum contribution which would have been exempt from income taxation under Section 404 of the United States Internal Revenue Code of 1954 as amended.

181B.08 NOTICE OF INTENTION TO CEASE OPERATIONS. Any employer who intends to cease to operate a place of employment or a pension plan within this state shall notify the commissioner of such intention not later than six months prior to the date the employer

intends to cease such operation. In the case of an employer who intends to cease to operate a place of employment or a pension plan within this state within six months of April 10, 1974, the notice required by this section shall be given by the employer as soon as practicable, but not later than ten days after April 10, 1974.

181B.09 INVESTIGATION BY COMMISSIONER. Upon receipt of such notification, or upon his own initiative when such notification is not given as required, the commissioner shall cause an investigation to be made of the employer to determine the number of employees who have completed ten or more years of covered service under the pension plan of the employer and whose nonvested or vested pension benefits have been or will be forfeited by such cessation, the number of employees whose vested pension benefits have been or will be forfeited by such cessation, the number of employees whose vested pension benefits have been or will be forfeited by such cessation, the amounts of such nonvested or vested pension benefits, if any, of such employees and the pension plan for such employees as may be necessary or useful to the commissioner to carry out his duties and responsibilities under sections 181B.01 to 181B.17. The investigation, insofar as practicable, shall be conducted at the employer's place of business during normal business hours. The employer shall cooperate fully with the commissioner in such investigation, and shall make available to him any books, records or other information necessary or useful to such investigation. To aid in such investigations, the commissioner is authorized to administer oaths and affirmations and to issue subpoenas to compel the attendance of witnesses or the production of books, records or other documents. The commissioner may seek,

through the attorney general acting on his behalf, orders from any court of competent jurisdiction to compel an employer to comply with the provisions of sections 181B.01 to 181B.17 and to punish disobedience of any subpoena issued pursuant to sections 181B.01 to 181B.17.

181B.10 DETERMINATION OF AMOUNT OF BENEFITS; AGREEMENTS AS TO BENEFITS. As part of the investigation of an employer, the commissioner shall determine the amount of nonvested and vested pension benefits which have been compromised or settled to his satisfaction. Nonvested and vested pension benefits may be compromised or settled by voluntary agreement between the employer and individual employees which is mutually understood by both parties to be a complete and final satisfaction of the employer's obligations regarding such benefits, provided that both parties are made fully aware of their rights and obligations under section 181B.-01 to 181B.17 prior to the making of such voluntary agreement. Before any such settlement can be made it must be approved by the commissioner. The commissioner shall not approve any settlement that is not fair and equitable. Further, for all settlements entered into by the employer the relationship between the present value of the compromised pension credits and the value of the settlement must be as constant as is practicable.

181B.11 CERTIFICATION OF AMOUNTS AVAILABLE. After the investigation of the employer the commissioner shall certify to the employer the present value of the total amount of nonvested and vested pension benefits which are includable in determining an employer's pension funding charge liability under sections 181B.01 to

181B.17 and the amount of such benefits which have been compromised or settled to the satisfaction of the commissioner. When the assets of an employer available for distribution under sections 181B.01 to 181B.17 are less than the sum total of the pension funding charges owed to employees as calculated by the commissioner, the commissioner shall calculate the proportion of available assets owned to each employee so that the actual amount to be received by any covered employee at normal retirement age divided by the amount that employee would have received at normal retirement age had there been no shortage of assets available for distribution under sections 181B.01 to 181B.17 is a ratio as constant as is possible from employee to employee. In seeking to keep such ratio constant the commissioner shall consider the amounts to be received by an employee from trust fund assets set aside for employee pension benefits but unavailable for distribution under sections 181B.01 to 181B.17. The amount certified by the commissioner shall be due and payable to the employees in the manner specified in section 181B.-12 on the date that the employer ceases to operate its place of employment or a pension plan and shall be a lien upon the employer's assets. If the pension funding charge is not paid when due, the employer shall be liable for interest on the amount due at the rate of eight percent per annum until the charge and interest are paid, and the attorney general of this state shall bring action in an appropriate district court of this state or in the courts of another state or in an appropriate federal court as provided for in section 181B.13.

181B.12 PURCHASE OF PREPAID DEFERRED ANNUITY. The amount certified by the commissioner as due and payable to the employees shall be paid to the employees by the employer through the purchase of a prepaid deferred annuity payable to the employee when he reaches normal retirement age or to his beneficiary upon the employee's death. Such purchase shall be made through a trust authorized by the United States Internal Revenue Service to make such purchases in a manner which exempts from federal income taxation the money used to purchase the annuity and all income earned by such annuity up to the date of the distribution of the annuity amount. In no event shall the amount of annuity to be distributed at normal retirement age exceed the amount of the accrued normal retirement benefit.

181B.13 RECOVERY OF AMOUNTS DUE. The commissioner shall maintain a separate record of each employee owed a pension funding charge under section 181B.01 to 181B.17. Ten days after any pension funding charge is due the commissioner shall tabulate all unpaid amounts and certify that figure to the attorney general who shall immediately take appropriate legal action as authorized in section 181B.11 on behalf of all aggrieved employees in a class action suit.

181B.14 ACTS CONSTITUTING TERMINATION. For the purposes of sections 181B.01 to 181B.17, the employment of any employee involuntarily terminated within one year of the date an employer ceases to operate a place of employment or a pension plan within this state, or within such longer period as prescribed by the commissioner when he determines that an employer is attempting to evade the provisions of sections 181B.01 to 181B.17, shall be deemed to have been terminated because of the employer's ceasing to operate its place of employment or

a pension plan, unless the employer can conclusively show that the termination was attributable to some other cause.

181B.15 RULES AND REGULATIONS. The commissioner may promulgate rules and regulations to provide for the efficient administration of the provisions of sections 181B.01 to 181B.17, or to clarify such provisions as may be necessary to effectuate the purposes of sections 181B.01 to 181B.17, and may from time to time specify any appropriate actuarial assumptions necessary to effectuate the purposes of sections 181B.01 to 181B.17.

181B.16 PROTECTION OF FUNDS FROM EXECUTION OR PROCESS. The funds of any employer which are set aside or reserved for benefits under a pension plan of the employer to which employees have a vested right shall not be liable to levy or attachment by virtue of any execution or civil process whatever, issued out of any court of this state, for the collection of the pension funding charge imposed by sections 181B.01 to 181B.17.

181B.17 EFFECTIVE DATE; EFFECT OF FEDERAL ACT IN AREA. Sections 181B.01 to 181B.17 shall take effect the day following final passage. Provided that sections 181B.01 to 181B.17 shall become null and void upon the institution of a mandatory plan of termination insurance guaranteeing the payment of a substantial portion of an employee's vested pension benefits pursuant to any law of the United States.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 76-1266

White Motor Corporation and White Farm Equipment Company,

Appellees,

vs.

E. I. Malone, Commissioner of Labor and Industry for the State of Minnesota,

Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that E. I. Malone and the State of Minnesota, the above-named appellants, hereby appeal to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Eighth Circuit filed and entered on December 2, 1976, reversing the judgment of the United States District Court for the District of Minnesota dated March 18, 1976.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

Dated: December 7th, 1976.

STATE OF MINNESOTA
WARREN SPANNAUS
Attorney General
/s/ RICHARD B. ALLYN
Solicitor General
160 State Office Building
Saint Paul, Minnesota 55155
Telephone: (612) 296-2961
Attorneys for Appellants